SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 612

THE CALIFORNIA OREGON POWER COMPANY, PETITIONER,

vs.

BEAVER PORTLAND CEMENT COMPANY AND CITY OF GOLD HILL, OREGON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Mr. A. E. REAMES, Liberty Building, Medford, Oregon,
For Appellant.

Mr. JOHN K. KOLLOCK, Corbett Building, Portland, Oregon, and
Mr. GUS NEWBURY, Medford, Oregon,
For Appellees.

In the District Court of the United States for the District of Oregon.

No. E.-9126.

THE CALIFORNIA OREGON POWER COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of California,

Plaintiff,

vs.

BEAVER PORTLAND CEMENT COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of Oregon, and

CITY OF GOLD HILL, OREGON, a Municipal Corporation, Existing Under the Laws of the State of Oregon,

Defendants.

CITATION ON APPEAL.

United States of America: To Beaver Portland Cement Company, a Corporation Duly Organized and Existing Under and by Virtue of the State of Oregon, and City of Gold Hill, Oregon, a Municipal Corporation, Existing Under the Laws of the State of Oregon, Defendants in the Above-entitled Cause:

YOU ARE HEREBY NOTIFIED that in a certain case in equity in the *United States Court* in and for the District of Oregon, wherein The California Oregon Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, is complainant, and the Beaver Portland Cement Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and City of Gold Hill, Oregon, a municipal corporation, existing under the laws of the State of Oregon are defendants, an appeal has been allowed the complainant therein to the United States Circuit Court of [1*] Appeals for the Ninth Circuit.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in said court at San Francisco, California, within thirty (30) days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should

*Page-number appearing at the foot of page of original certified Transcript of Record.

not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable JAMES ALGER FEE, Judge of the United States District Court for the District of Oregon, this the 23d day of March, 1932.

JAMES ALGER FEE,
United States District Judge. [2]

Due and legal service of the within is hereby acknowledged this twenty-third day of March, 1932.

JOHN K. KOLLOCK,
Attorney for Defendants.

[Endorsed]: Filed Mar. 23, 1932. [3]

In the District Court of the United States for the District of Oregon.

July Term, 1930.

BE IT REMEMBERED, That on the 26th day of July, 1930, there was duly filed in the District Court of the United States for the District of Oregon a bill of complaint in words and figures as follows, to wit:

In the District Court of the United States, for the District of Oregon, Sitting at Portland, Oregon.

THE CALIFORNIA OREGON POWER COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of California,

Plaintiff,

vs.

BEAVER-PORTLAND CEMENT COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of Oregon and CITY OF GOLD HILL, OREGON, a Municipal Corporation Existing Under the Laws of the State of Oregon,

Defendants. [4]

BILL OF COMPLAINT.

To the Honorable R. S. BEAN and to the Honorable JOHN H. McNARY, Judges of the District Court of the United States, for the District of Oregon:

The California Oregon Power Company, a citizen of the State of California, residing in the City and County of San Francisco therein, brings this bill of complaint against Beaver-Portland Cement Company, an Oregon corporation, residing at Portland, Oregon, and City of Gold Hill, a municipal corporation of the State of Oregon, residing in Jackson County, Oregon, and complains and alleges:

I.

That during all of the times herein mentioned since the year 1920 the plaintiff, The California Oregon Power Company, has been and now is a public service corporation, possessing the powers of eminent domain, and organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco therein and resident in said state. That after its organization it complied with the laws of the State of Oregon for the transaction of business therein and ever since has been and now is so qualified to act. That during all of said times it has been and is empowered to manufacture and supply hydro-electric power to the public generally and to municipalities in Oregon, and elsewhere. That more than five years preceding the institution of this suit in this court the plaintiff filed with the Public Service Commission of Oregon its tariffs as a public utility showing its intention to supply electrical power to the public generally as a public utility; that thereafter a hearing was had before said commission and an order made fixing and establishing [5] rates and tariffs to be charged and collected by the plaintiff for such current which was so supplied to municipalities such as the defendant city and to private corporations such as said defendant company; that thereafter the plaintiff furnished continuously to all consumers within the territory served by it electric power and current in accordance with said tariff. That ever

since the filing of said tariff, plaintiff has rapidly increased its facilities for the manufacture of such power and has kept pace and is keeping pace with the demand for such power in such territory served by the plaintiff, and intends to and will comply with its duties and obligations as a public service corporation to so extend its service and increase its facilities for the supplying of such service according to such demand for such current and to that end it did on the 11th day of March, 1921, purchase and acquire the property described in Paragraph IV hereof, being lots one and two of Section 15, Township 36 South, Range 3 West of Willamette Meridian.

II.

That during all of the times herein mentioned the defendant, Beaver-Portland Cement Company, has been and now is a private corporation duly organized and existing under and by virtue of the laws of the State of Oregon and having its principal place of business in and being a resident in Portland, Multnomah County, Oregon. That during none of said times has said corporation ever had, nor does it now possess or exercise any of the powers of eminent domain, nor is the same in any sense a public service corporation. But it is, and during all of such times has been a private corporation engaged in Jackson County, Oregon, in the manufacture of cement, and in connection with such manufacture it uses, and has for more than two years last past used electric current

generated and manufactured by this [6] plaintiff as such public service corporation.

III.

That during all of the times herein mentioned, the defendant City of Gold Hill has been and now is one of the municipal corporations of Oregon organized under the laws of such State and situate and resident in Jackson County, Oregon.

IV.

That ever since the 11th day of March, 1921, the plaintiff has been and now is the owner in fee simple and in the possession of Lots One and Two in Section 15, Township 36 South, of Range 3 West of Willamette Meridian in Jackson County, Oregon, which said lands are situated along the bank of a non-navigable stream known as Rogue River. That plaintiff's ownership of such land extends under the waters of said river and includes the bed thereof lying in front of said Lots 1 and 2 to the middle of the channel or thread of the current of said stream. That said lands are riparian to such stream and during all of the times herein mentioned the plaintiff has been and is the owner of said riparian lands in front of and belonging to said lots extending from the shore line of said non-navigable stream to the middle of the current thereof.

V.

That heretofore on the 20th day of December, 1929, a suit was pending herein, Number E.-8991,

in which this plaintiff was plaintiff and the defendants herein were defendants, in which a decree was on that date duly made, rendered and entered, which among other things decreed as follows:

> "That the plaintiff, The California Oregon Power Company, a public service corporation organized and existing under and by virtue of the laws of the State of California and qualified to transact business in Oregon, is the [7] owner and entitled to the possession of lots one (1) and two (2) in Section 15, Township 36 South, range three (3) West of the Willamette Meridian, Jackson County, Oregon, and which lands lie and are situated along the bank of Rogue River, which is a non-navigable stream. That plaintiff's ownership of said lands extends under the waters of said river, and includes the bed thereof lying in front of said lots, and to the middle of the channel or thread of the current of said stream."

That said decree has never been appealed from and is still in full force and effect.

VI.

That the defendant city was by said decree decreed to be the owner of an easement upon said Lot 1 on a site of an old crib referred to therein, and said decree as to such easement provides as follows:

> "That said old crib or pier herein referred to and for which defendant City has said easement is situate on the said lot 1; the most southwest-

erly corner of said old crib or pier bore north 88° 30′ east and distant 168 feet from a point on the west bank of Rogue River marked by a surveyor's stake and distant 400 feet south from the north quarter corner of Section 15, Township 36 south, range 3 West of the Willamette Meridian, and also bore north 54° 16′ east from a point on the west bank of said river 516.14 feet south from said north quarter corner; the most northwesterly point of said old crib or pier bore north 4° 30′ 47″ each from such southwesterly corner of said crib a distance of 80 feet; the width of said old crib or pier was 10 feet; and its height was 4 feet above low water." [8]

VII.

That by the terms of said decree the defendants herein and each of them were and they are enjoined as follows:

"That the defendants and each thereof, their agents, servants and employees, and all others in the aid or behalf of either thereof, be, and they and each of them hereby are, forever enjoined from building or maintaining any structure or diversion or obstruction works upo any part of said plaintiff's lots one and two, as the same extend under the waters of said river, and to the middle of the channel or the current of said stream, except that it may exercise said easement on the site of such old crib or pier, and to the extent of the size and dimensions thereof as herein determined."

VIII.

That said decree further provides as follows:

"This decree is without prejudice to such rights, if any, as either party to this suit may have under the principle of riparian rights or by appropriation. The water rights, if any, of the parties to this suit, whether claimed under the riparian doctrine, or under the doctrine of appropriation, are not determined."

IX.

That said defendant City of Gold Hill holds the legal title to Lots 6 and 8 and a portion of Lot 7 in said Section 15, all of which it has sold to the defendant Cement Company, but to which title has not been passed, and which title is held as security for the purchase price of said property under a contract of sale executed about the 19th day of October, 1926, from the said city to the said Cement Company and which contract the plaintiff alleges is still in full force and effect although the same may have been, without the knowledge of the plaintiff, [9] modified or changed.

X.

That plaintiff's said Lots 1 and 2 are situated upon the east side of said river and said lots are contiguous, [illegible]e north line of said Lot 2 being the South Line of said Lot 1. That said Lots 8, 7 and 6 are situated upon the west side of said stream; said Lot 8 being opposite said Lot 1; said Lot 7 being opposite said Lot 2; and said Lot 6 adjoins Lot 7 on the south. That said Lots 8, 7 and 6 border on said stream.

XI.

That while the said suit No. E.–8991 was pending, the defendant Cement Company drilled numerous holes in the bedrock bottom of said river on said Lot 8 for the purpose of and with the intention of inserting dynamite in said holes and exploding the same and thereby lowering the bed of said river so as to draw the waters of said stream away from the shores and lands of said Lots 1 and 2. That immediately when the plaintiff obtained knowledge of said action it notified the defendants herein not to so blast the channel of said stream and the defendants desisted such operations, however, filling said holes with wooden plugs to keep the same from filling with sand and other materials. On the evening of the 21st day of July, 1930, the defendant Cement Company, without the knowledge or consent of the plaintiff, exploded large quantities of dynamite that had been inserted in said holes in the bed of said river and perhaps in other similar holes so drilled in said stream bed without the knowledge of the plaintiff. That by such explosion of said dynamite the defendant cement company shattered and broke the rock in the bed of said stream for a distance of more than one hundred feet up and down said stream and for a width of more than fifty feet and to a depth of approximately eight feet. That said acts were clandestinely [10] done and without the knowledge or consent of the plaintiff and against its will. That the purpose and intention of the defendant cement company was and is to remove the stone so

broken in the bottom of said river and to thereby create a race in the bed of said stream, which will be at least fifty by one hundred feet and at least eight feet in depth. That the defendant cement company is now continuing such drilling operations with the intention of continuing the construction of such deep race in the bottom of said stream and unless restrained herein the said defendant cement company will remove said stone from such portions of said river bed that have been so blasted and will explode additional blasts and remove the stone so broken thereby and will draw into said race all of the running water of said stream and leave the plaintiff's said lots one and two without any water thereon. That said operations are continuing rapidly and it is necessary that a restraining order be immediately made restraining the said defendant cement company and the said city from so permanently changing the thread and current of said stream from the plaintiff's said land. That the defendants intend to and will, unless so restrained at once permanently change the thread and channel of said stream from where it now is and from where the same was when the rights of the respective parties were so adjudicated and determined in said suit No. E.-8991. That such action by said defendant if continued will take from plaintiff's said Lots 1 and 2 all of the running waters of said stream during the low water period and would at the present time divert from said lands all of said waters. Said action would leave plaintiff's lands high and dry; they would no longer border upon said stream as they now and naturally

do, nor would the waters of said stream flow over said land or any part thereof during the period of low water in said stream. [11]

XII.

That the plaintiff needs and requires said Lots 1 and 2 with said waters for the purpose of the manufacture of electric power to so furnish to consumers as a public utility. That it acquired said lands with their said riparian rights for such purpose and intends to immediately use said lands for such purposes. That ever since the year 1926 the parties hereto have been in litigation concerning the use of plaintiff's said lands and the waters of said stream so that the plaintiff has not had during any of said time an opportunity to construct upon said lands the facilities necessary to so use its said lots and said water for such public purposes.

XIII.

That all of these said acts of the defendants, and particularly of said defendant the cement company are wrongful and unlawful and if permitted to continue will entirely destroy plaintiff's said lots 1 and 2 for such purposes and will cause the plaintiff to suffer great and irreparable injury and damage.

XIV.

That the value of the subject matter or the amount in dispute herein exceeds, exclusive of interest and costs, the sum of five thousands dollars. That the value of plaintiff's property so being destroyed by the defendants is in excess of the sum

of thirty thousand dollars. That the entire value of such property for power purposes if it shall be so deprived of said water will be entirely lost to the plaintiff.

XV.

That the defendant City of Gold Hill is aiding and abetting the said defendant cement company in its said wrongful operations in so permanently changing the channel of said [12] stream as to take such stream entirely away from plaintiff's said Lots one and two and it is necessary that a restraining order be immediately and without notice made restraining the defendants and each of them from removing any of the stone or other material from the bottom of said river or from changing the channel or thread of said stream or from carrying on any drilling operations in the bed of said stream for the purpose or with the intention of permanently changing the course of said stream and restraining them and each of them from blasting the rocks or stones in the bed or channel of said stream and from doing any act or thing that would in any way either change the channel of said stream or the course thereof or draw or divert from said Lots 1 and/or 2 any of the waters naturally flowing in said stream or from doing anything that will interfere with the natural flow of said stream over plaintiff's said Lots 1 and 2.

XVI.

That the defendant cement company has by its said drilling and the exploding of such dynamite and the shattering of the bed of said stream dam-

aged the plaintiff in the sum of five thousand dollars and if such acts shall be continued the plaintiff will suffer great and irreparable injury and damage.

XVII.

That the defendants give out and assert that they intend and will so lower the bed of the stream along the west line of the thread thereof so as to draw from the plaintiff's said Lots 1 and 2 the entire stream at low water, to the great and irreparable injury and damage of the plaintiff.

XVIII.

That the plaintiff has no plain, speedy or [13] adequate remedy at law and therefore comes into equity.

WHEREFORE the plaintiff prays that immediately upon the filing of this complaint, without notice, a restraining order issue restraining the defendants and each of them, their agents, servants and employees and all others in the aid or behalf of either or any thereof and restraining their successors and the agents, servants and employees thereof from doing anything that will lower or change the bed of said stream or that will lessen the flow of the water of said stream at and over plaintiff's said Lots 1 and/or 2, and from carrying on any drilling or blasting operations in the bed of said stream, or from removing from the bed of said stream any of the rocks or other material that have been shattered or broken or loosened by any drilling or blasting operations of the defendants or either

thereof, or doing any acts that will be of any injury to plaintiff's said Lots 1 and 2.

That upon a hearing herein such restraining order become an injunction and that upon a final hearing herein such injunction be made perpetual.

That plaintiff be decreed to be the owner in fee simple of said Lots 1 and 2; that said lots be decreed to be riparian to said stream and that plaintiff's said ownership of said lots extends under the waters of said stream to the center of the current or thread of said stream and that the defendants be enjoined from chaning said thread or current.

That the plaintiff have judgment against the defendant cement company for the sum of five thousand dollars damages and the costs and disbursements of this suit to be taxed, and for such other and further relief as to the court shall seem just and equitable in the premises.

A. E. REAMES,
Attorney for Plaintiff.

(Verification omitted.)

Filed July 26, 1930. [14]

AND AFTERWARDS, to wit, on Saturday, the 26th day of July, 1930, the same being the 16th judicial day of the regular July term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit:

[Title of Court and Cause.]

RESTRAINING ORDER.

Upon considering of the duly verified complaint of the plaintiff herein from which it appears that unless a restraining order be at once issued without notice immediate and irreparable loss and damage will result to the plaintiff and the plaintiff having tendered with its application for such order a good and sufficient surety bond in the sum of five thousand dollars and which bond and the amount thereof are hereby approved, and the court having heard A. E. Reames, of counsel for the plaintiff, and being fully advised in the premises,—

IT IS ORDERED, ADJUDGED AND DECREED that until the further order herein, the defendants, Beaver-Portland Cement Company, a private corporation of Oregon, and the City of Gold Hill, a municipal corporation of Oregon, their agents, servants and employees and all others in the aid or behalf of either thereof, and the successors of either and their agents, servants and employees, be and they and each of them hereby are restrained from and ordered not to do anything which will draw from either Lots 1 or 2, Section 15, Township 36 South, Range 3 West of Willamette Meridian any of the waters of said Rogue River now flowing over, upon or across said lots or either thereof or which naturally flow along or over the same, or which would in anywise lower the channel of said stream opposite said lots, either on Lot 8 in said

section [15] or elsewhere that would in any way change the center or thread of said Rogue River at or in front of or along said Lots 1 and/or 2, nor to remove any of the stone or other materials from the channel of said stream that would tend to draw from said Lots 1 and/or 2, any of the waters of said stream naturally flowing there or to drill any holes for powder or other explosives in said stream where the same would so tend to so change the course of said stream nor to explode any dynamite or other explosives that would break or shatter the bed of said stream at such places as would lower or change the bed of said stream whereby any of the waters naturally flowing in said stream would be withdrawn or diverted from either said Lots 1 and/or 2, or both thereof.

This order is made returnable to this court at the hour of 10 A. M. on the 30th day of July, 1930, at which time the plaintiff's application for an injunction in accordance with this order shall be heard.

The defendants and each of them and all others in their aid or behalf are hereby ordered to at said time show why such an injunction should not issue subject to the further order herein.

Dated at Portland, Oregon, this 26th day of July, 1930, at 10 A. M.

JOHN H. McNARY,
District Judge.

Filed July 26, 1930. [16]

AND AFTERWARDS, to wit, on the 18th day of September, 1930, there was duly filed in said court a stipulation between the parties, in words and figures as follows, to wit:

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO ANSWER AND RELATIVE TO HEARING ON ORDER TO SHOW CAUSE.

It is hereby stipulated by and between the parties hereto through their respective attorneys who have executed this stipulation, that

WHEREAS on the 26th day of July, 1930, a restraining order was issued in the above-entitled court and cause, restraining the defendants from the commission of certain acts as therein recited, and which order with the subpoena herein has been duly served, and

WHEREAS said restraining order fixed the hour of ten o'clock A. M. on Wednesday, the 30th day of July, 1930, for a hearing upon plaintiff's application to make such restraining order an injunction herein,—

NOW, THEREFORE, it is hereby stipulated by and between the parties hereto that the hearing upon said application for the injunction be postponed until some time in the month of September, 1930, to be designated by either or any of the parties hereto for such hearing; that such notice shall be for a hearing at a time convenient to the

above-entitled court and that such notice shall not be given before the first day of September, 1930, and such notice shall not be for a less time than 10 days; that the time within which the defendants are required to answer herein may be extended until the time of the giving of said notice; that an order may be made in the above-entitled court and cause in accordance with this stipulation upon the application of any of the parties hereto without notice to the others; that pending the hearing upon the plaintiff's application for said injunction, the said restraining order [17] shall be and remain in full force and effect and so remain in effect until otherwise ordered by the court after such hearing.

A. E. REAMES,
Attorney for Plaintiff.
GUS NEWBURY,
Attorney for Defendants.

Filed September 18, 1930. [18]

AND AFTERWARDS, to wit, on the 18th day of September, 1930, there was duly filed in said court an answer, in words and figures as follows, to wit:

[Title of Court and Cause.]

ANSWER.

To the Honorable R. S. BEAN and to the Honorable JOHN H. McNARY, Judges of the District Court of the United States, for the District of Oregon:

Come now Beaver Portland Cement Company, a

corporation duly organized and existing under and by virtue of the Laws of the State of Oregon, and the City of Gold Hill, Oregon, a municipal corporation, and for answer to the bill of complaint herein:

I.

As to the allegations of Paragraph I, admit that during all the times mentioned in the complaint California Oregon Power Company has been, and now is, a public service corporation, possessing the powers of eminent domain, and organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco therein and resident in said state; that after its organization it complied with the laws of the State of Oregon for the transaction of business therein, and ever since has been and is now so qualified to act; and that during all of said times has been, and is now, empowered to manufacture and supply hydro-electric power to the public generally and to municipalities in Oregon and elsewhere.

II.

As to the further allegations of Paragraph I, deny [19] any knowledge or information sufficient to form a belief as to whether more than five years preceding the institution of this suit, or at any time, the plaintiff filed with the Public Service Commission of Oregon, its tariffs as a public utility, and whether thereafter a hearing was had besaid Commission and an order made fixing and establishing rates and tariffs to be charged and

collected by the plaintiff to municipalities and private corporations; or whether thereafter the plaintiff furnished continuously to all consumers within the territory served by it, electric power and current according to said tariffs, or whether since the filing of said tariffs, or at any time, plaintiff has increased its facilities for the manufacture of such power and has kept pace, or is keeping pace, with the demands for such power in the territory served by plaintiff, or that the plaintiff intends to, or will, comply with its duties and obligations as a public service corporation to extend its service or increase its facilities for the supplying of such service according to the demands for such current, and therefore deny all of said allegations.

III.

As to the further allegations contained in said Paragraph I, defendants admit that on the 11th day of March, 1921, the plaintiff purchased and acquired the property described in Paragraph IV of the complaint, being Lots 1 and 2, Section 15, Township 36 South, Range 3 West of the Willamette Meridian, and deny any knowledge or information as to the end with which it purchased and acquired said property.

IV.

Admit all and several the allegations of Paragraph II.

V.

Admit all and several the allegations of Paragraph III. [20]

VI.

Admit all and several the allegations of Paragraph IV, save and except the defendants allege that plaintiff's ownership of Lots 1 and 2, in Section 15, Township 36 South of Range 3 West of the Willamette Meridian, extends under the water of said river and includes the bed thereof lying in front of said Lots 1 and 2 to the thread of the stream; and that in non-navigable rivers of the State of Oregon, the thread of the stream as marking and defining the dividing line of ownership of properties abutting and fronting upon opposite sides of said stream, is the middle line of the river at low water therein, and is a line equidistant from all points on opposite banks at right angles with the thread of the stream at lowest stage of water therein.

VI.

Admit all and several the allegations of Paragraph V.

VII.

Admit all and several the allegations of Paragraph VI.

VIII.

Admit all and several the allegations of Paragraph VII.

IX.

Admit all and several the allegations of Paragraph VIII.

X.

Admit that the defendant City of Gold Hill holds the legal title to Lots 6 and 8 and a portion of lot

7, in Section 15, Township 36 South, Range 3 West of the Willamette Meridian; deny all of the other allegations of Paragraph IX, and allege that said property is in the possession of defendant Beaver Portland Cement Company under a contract of lease and option to [21] purchase; a copy of which lease and option to purchase is set forth as an exhibit to the further and separate answer and defense of these defendants; and further allege that the ownership of defendant City of Gold Hill in and to the said lands extends under the water of said river and of the bed thereof lying in front of said lots to the thread of the stream.

XI.

Admit all and several the allegations of Paragraph X.

XII.

As to the allegations of Paragraph XI, admit that on the evening of the 21st day of July, 1930, the defendant Beaver Portland Cement Company, without the consent of the plaintiff, exploded quantities of dynamite in holes drilled in rock formation lying entirely west of the thread of the stream between the property of plaintiff and of defendant City of Gold Hill as specifically described in the complaint; which rocks, in place, were an obstruction to the flow of the waters of Rogue River, and that by such explosion the defendant Beaver Portland Cement Company shattered and broke such rock formations for a maximum distance up and down said stream of approximately 100 feet, and

for a maximum width of approximately 27 feet, and for a depth in the rock where said holes were drilled of approximately eight feet, but at no point below the bed of the stream, and that the purpose and intention of the defendant Beaver Portland Cement Company was to remove the rock so broken and lying in the bed of said Rogue River westerly from the thread of said stream, and that the defendant Beaver Portland Cement Company, if and when the restraining order herein issued shall have been dissolved, will remove said rock; and deny generally each and every other allegation of said Paragraph XI. [22]

XIII.

Deny all and several the allegations of Paragraph XII.

XIV.

Deny all and several the allegations of Paragraph XIII.

XV.

Deny all and several the allegations of Paragraph XIV.

XVI.

Deny all and several the allegations of Paragraph XV.

XVII.

Deny all and several the allegations of Paragraph XVI.

XVIII.

Deny all and several the allegations of Paragraph XVII.

XIX.

Deny all and several the allegations of Paragraph XVIII.

And for a further and separate answer to plaintiff's complaint, these defendants allege:

I.

That during all the times herein mentioned the California Oregon Power Company has been, and now is, a corporation, incorporated and organized and existing under and by virtue of the laws of the State of California.

II.

That during all the times herein mentioned defendant City of Gold Hill has been, and now is, a municipal corporation [23] of the State of Oregon, incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and being situate in the County of Jackson, State of Oregon.

III.

That during all of the times herein mentioned defendant Beaver Portland Cement Company has been, and now is, a private corporation, incorporated, organized and existing under and by virtue of the laws of the State of Oregon, having its principal office in the City of Portland, Multnomah, Oregon, and an office and place of business in the vicinity of Gold Hill, Jackson County, Oregon.

IV.

That the plaintiff is the owner and in possession

of Lots 1 and 2, Section 15, in Township 36 South, Range 3 West of the Willamette Meridian, in Jackson County, Oregon, abutting on and adjoining Rogue River; that patent for said property from the United States was issued to Francis Marion Friedenberg April 20th, 1885; that said lands were acquired in 1902 by Condor Water & Power Company, a corporation, incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and thereafter, through mesne conveyances, passed to the plaintiff on or about the 11th day of March, 1921; that neither the plaintiff nor any of its predecessors in the title to said property has at any time constructed any works for the application to a beneficial use of any portion of the waters of Rogue River flowing by or along its said property, or made any beneficial use of said water, or any portion thereof, either prior to the enactment of Chapter 216 of the General Laws of Oregon for 1909, being the act commonly known and designated as the Oregon Water Code, or at any time subsequent thereto; that neither the plaintiff nor [24] its predecessors in interest have at any time made or attempted to make any appropriation of the waters of Rogue River under the laws of the State of Oregon applicable thereto, nor has the plaintiff, nor any of its predecessors in title, ever had any right to the waters of said river at or appurtenant to the real property of the plaintiff described in the complaint.

V.

That in that certain suit in equity originally

pending in the Circuit Court of the State of Oregon for Jackson County, between Condor Water & Power Company, a corporation, and Gold Hill Canal Company, a corporation, predecessors in interest and in the ownership of the real property hereinabove described, and involving the right of the defendant Gold Hill Canal Company to construct a dam over and across Rogue River, which suit in equity was subsequently removed to the United States District Court for the District of Oregon, the plaintiff therein, in and by its complaint filed on the 10th day of September, 1906, alleged that Lots 1 and 2, Section 15, Township 36 South, Range 3 West of the Willamette Meridian, in Jackson County, Oregon, being the real property described in the complaint herein as the property of the plaintiff, has been acquired by the plaintiff therein, to wit, The Condor Water & Power Company, predecessor of plaintiff herein, for the purpose of carrying on its objects, purposes and business in the appropriation of water and the manufacture of power for public purposes and for the sale and distribution of water and electrical power to the public, and that plaintiff needed said Lots 1 and 2 and the riparian rights belonging thereto for the purposes for which said corporation was organized, and that the demand for electric current and water for irrigation was increasing and that plaintiff would be required to meet said demand.

That on or about the 5th day of October, 1926, [25] defendant City of Gold Hill, as plaintiff, in-

stituted in the Circuit Court of the State of Oregon for Jackson County, a complaint against the plaintiff herein, for the condemnation by said City of Gold Hill of all those portions of said Lot 1 upon which said City of Gold Hill proposed to construct a dam across Rogue River, and that in its answer filed in said condemnation proceedings, the plaintiff herein, as defendant in said action, alleged, among other things, that it was a public service corporation; that it had acquired said Lot 1 for the purpose of using it in connection with the manufacture of electrical energy to furnish power to consumers and to the public generally and as a public utility; that it had determined that it should construct and that it did intend to construct upon said property a hydro-electric plant for the manufacture of electric power; that it was holding said property to make said power development as soon as the market should require such power.

That in that certain suit in equity pending in the District Court of the United States for the District of Oregon on the 13th day of September, 1928, in which the plaintiff herein was plaintiff, and defendants herein were defendants, the plaintiff herein in and by its complaint alleged that the plaintiff herein and therein acquired Lots 1 and 2, Section 15, Township 36 South, Range 3 West, for the purpose of establishing diversion works to divert the waters of Rogue River for the purpose of manufacturing such power, and that it then needed and required the same for said purpose, and that it would so utilize said property for such public

purposes as soon as there should be a market within its territory to be served with such power, which event would occur in a very short time.

That notwithstanding said allegations, neither the plaintiff nor its predecessors in interest, or its predecessors in interest in the ownership of said property, have at any time since 1906 taken any steps to appropriate the waters of Rogue River [26] at the point in question, or to apply the same to a beneficial use, or to construct any works for such appropriation and application.

That the litigation pending between the parties hereto since 1926, including the condemnation proceeding in the Circuit Court of the State of Oregon for Jackson County, the suit in equity, E.–8991, in the District Court of the United States for the District of Oregon, and the pending suit, has not in anywise involved the right of the plaintiff herein, if it had any such right, to appropriate or attempt to appropriate to a beneficial use, the waters of Rogue River at the point in controversy in the pending litigation, but have solely involved the rights of the defendants to construct such works as would enable them to apply to a beneficial use the waters of Rogue River owned and held by defendant City of Gold Hill by adjudication and appropriation.

VI.

That the opposition by the plaintiff herein to the effort made by defendant City of Gold Hill to condemn, under the right of eminent domain, an easement for the construction of a dam across Rogue

River from the property of defendant City of Gold Hill on the west bank of said river to the property of the plaintiff on the east bank, and the institution by plaintiff of the suit in equity, No. E.–8991, in the District Court of the United States for the District of Oregon, to enjoin, and which did enjoin, the construction of a wing-dam from the west bank of Rogue River upon the property of the said defendant City of Gold Hill, to the site of the old crib near the east bank of said river and beyond and east of the thread of Rogue River at the point in controversy and the institution of the pending litigation, are not prompted or actuated in good faith, by any desire or intention on the part of the plaintiff herein to [27] utilize its real property, to wit, Lots 1 and 2, in the construction of any works for the application of the waters of Rogue River to a beneficial use, but solely and exclusively to prevent the defendants from applying the waters of Rogue River to which they are entitled by adjudication and appropriation to a beneficial use and from the construction of hydro-electric works by which electric power would be supplied to defendant Beaver Portland Cement Company in connection with its operation of a cement plant in the immediate vicinity of Gold Hill, and thereby deprive plaintiff of a profitable customer for the electric power manufactured by it and distributed through Rogue River territory.

VII.

That the plaintiff owns, holds and has in operation, electric power plants from which, as a public

utility corporation, it can supply electric power to its customers within the territory covered by it, with a developed horse-power of approximately 125,000 horse-power, which is amply sufficient to meet all the present demands of the market; and has applied to the State Engineer of the State of Oregon for final permits covering 245,420 horse-power, involving completion of the proposed plants within a period of from five to twenty years, and that the development of such plants will more than meet any possible requirements for power of said company within said period of twenty years.

VIII.

That the development of power on Rogue River at the site of plaintiff's and defendants' real property hereinabove described would involve a maximum development of not to exceed 5,700 horse-power, provided that the water of Rogue River at the point in question could be appropriated by the plaintiff, and provided that the rights of defendant City of Gold Hill [28] in and to the west bank of said river opposite the real property of the plaintiff and to the waters of Rogue River now appropriated and owned by it, could be appropriated by the plaintiff under the law of eminent domain.

IX.

That by Chapter 287 of the General Laws of Oregon of 1929, it was enacted that all of the waters flowing in the main channel of Rogue River below the south line of Section 27, Township 33 South,

Range 1 East, were forever withdrawn from appropriation except for domestic, stock, irrigation and municipal purposes. That the defendant City of Gold Hill is a municipal corporation under the laws of the State of Oregon and its right to real property and the waters of Rogue River are not subject to condemnation at a suit of a public service corporation.

X.

That the defendant City of Gold Hill is the owner and in possession of Lots 5, 6, 7 and 8, of Section 15, Township 36 South, Range 3 West of the Willamette Meridian, in Jackson County, Oregon, abutting on and adjoining Rogue River and directly across said river from the real property of the plaintiff hereinabove and in the complaint herein described, and the bed of Rogue River opposite said lots to and west of the thread of the stream.

XI.

That the defendant City of Gold Hill is the owner and in possession of the right to divert, for the development of power and for other purposes, 1397 cubic feet per second of the waters of Rogue River, to wit:

(a) 75 cubic feet per second adjudicated to [29] Neilson & McClure in the proceedings in the Circuit Court of the State of Oregon for Jackson County, adjudicating the relative rights to the waters of Rogue River and its tributaries; which decree was entered of record in said court on the 26th day of April, 1919, and conveyed by mesne conveyances to defendant City of Gold Hill; with

a point of diversion in Lot 3 of Section 11, Township 36 South, Range 3 West of the Willamette Meridian, and for use and application in Section 15, Township 36 South, Range 3 West of the Willamette Meridian.

(b) 220 cubic feet per second adjudicated to Oregon Water & Power Company by said adjudication and conveyed to the defendant City of Gold Hill by mesne conveyance with a point of diversion at a point in the northeast quarter of the northwest quarter of Section 15, Township 36 South, Range 3 West of the Willamette Meridian, and for application to a beneficial us within said section.

(c) 147 cubic feet per second awarded to defendant City of Gold Hill by Permit of the State Engineer of the State of Oregon, No. 3275, February 28th, 1917, based on Application No. 5410; of which appropriation, 25 cubic feet per second have been conveyed under contract to Gold Hill Irrigation District, leaving the net appropriation under said application and permit, 122 cubic-feet per second; with a point of diversion in the northwest quarter of Section 11, Township 36 South, Range 3 West of the Willamette Meridian, for application within Section 15, said township and range.

(d) 980 cubic feet per second awarded to defendant City of Gold Hill by permit No. 7942 issued by the State Engineer of the State of Oregon May 26th, 1927, as an [30] enlargement of Permit No. 3275 theretofore issued by said State Engineer on Application No. 9738; with a point of diversion in the northwest quarter of Section 15,

Township 36 South, Range 3 West of the Willamette Meridian and for application within said section.

XII.

That for more than thirty years the defendant City of Gold Hill and its predecessors in the ownership of the right to use the waters of Rogue River under the rights adjudicated and granted as described in the last preceding paragraph have been using such waters in the development of power, in supplying water for domestic uses to the citizens of Gold Hill, and in the generation and distribution of electrical energy for light and power purposes.

XIII.

That on or about the 19th day of October, 1926, there was made and entered into by and between defendant City of Gold Hill and defendant Beaver Portland Cement Company, an agreement of lease and option to purchase; a copy of which is hereto attached as Exhibit "A" and by this reference made a part hereof.

XIV.

That defendant Beaver Portland Cement Company entered upon possession of said property under and by virtue of said option and contract and is proceeding in good faith in the development thereof in pursuance of said contract, and not otherwise, and that the development of said property is necessary for defendant City of Gold Hill and its citizens.

XV.

That the defendant Beaver Portland Cement

Company [31] is now, and has been since the year 1914, engaged in the operation of a cement plant in the immediate vicinity of the City of Gold Hill, just outside of the City Limits thereof, and employs a large force of men, and that substantially all of the labor employed at said plant is furnished by residents and citizens of the City of Gold Hill.

XVI.

That subsequent to the entry on the 20th day of December, 1929, of final decree pursuant to mandate of the United States Circuit Court of Appeals for the Ninth Circuit, in Case No. E.-8991, and prior to the 21st day of July, 1930; defendant Beaver Portland Cement Company has been, and was, proceeding to construct from the west bank of Rogue River on the property of defendant City of Gold Hill held by said defendant Beaver Portland Cement Company under lease and option agreement as hereinabove set forth, a wing-dam extending to but entirely west of the thread of the stream of Rogue River between the real property of plaintiff and of defendant City of Gold Hill as defined in the complaint and in this further and separate answer, and was proposing to construct as soon as physical conditions should warrant and as soon as broken rock should be available for such construction, a structure on the site of the old crib referred to and described in said decree, and entirely within the dimensions of the old crib as so established.

XVII.

That west of the thread of the stream as so de-

fined, and below and downstream from the structure upon the site of the old crib, and below and downstream from the head and eastern terminus of the wing-dam as the same is proposed to be constructed by the defendant Beaver Portland Cement Company under its contract with defendant City of Gold Hill, Rogue River was, and is obstructed by reefs of rock which have materialy obstructed [32] the flow of said Rogue River and prevented the development and utilization by the defendants of the water rights vested in them by adjudication and appropriation as said rights are hereinabove specifically set forth.

XVIII.

That on the 21st day of July, 1930, for the purpose of procuring the greatest possible development of power from the waters of Rogue River to which the defendant City of Gold Hill is entitled by adjudication and appropriation as hereinabove set forth, and to as nearly as possible completely utilize all of the water to which defendant City of Gold Hill is and was so entitled, and especially to permit the free flow of, and thereby to utilize, the waters of Rogue River which would be diverted by the construction of the wing-dam to, but entirely west of the thread of the stream, in process of construction by defendant Beaver Portland Cement Company as hereinabove described, and further to procure an available supply of broken rock for the erection of the structure on the site of the old crib hereinabove referred to, as defined by the final decree in case No. E.-8991, the defendant Beaver

Portland Cement Company exploded certain charges of dynamite in said rock reefs in said Rogue River, and that by such explosion, such rock reefs were broken and shattered, and the rocks so broken and shattered lays in the channel of Rogue River west of the thread of said stream, and defendant Beaver Portland Cement Company was engaged in removing, and would, if it had not been restrained by the restraining order herein, have removed said shattered rock from the bed of the stream.

WHEREFORE, defendants having fully answered the bill herein, pray that the above-entitled cause be dismissed and that the defendants have and recover of and from the plaintiff their costs and disbursements herein. [33]

JOHN K. KOLLOCK,
Attorney for Defendants.

(Verification omitted.) [34]

EXHIBIT "A."

THIS AGREEMENT, made this 19th day of October, A. D. 1926, between the City of Gold Hill, Oregon, a municipal corporation, party of the first part, and the Beaver Portland Cement Company, a corporation, party of the second part,

WITNESSETH: Whereas, pursuant to a vote of the electors of said City of Gold Hill at a special election held July 6, 1926, it was determined to accept that certain proposition of the party of the second part for the lease and option of purchase of the hydro-electric power site, plant and equipment

of party of the first part and all its interest in and to the real property therein referred to, and specified, upon the terms conditioned in said offer,—a copy of said offer being hereto attached and made a part of this agreement, for the purpose of construing the same;

NOW, THEREFORE, the party of the first part, in consideration of the rent to be paid, and the performance of the covenant and conditions herein agreed to by party of the second part, does hereby let, lease, and demise unto said party of the second part, all the following described real and personal property, and rights and interests therein, to wit:

1. Lots one (1) and Two (2), Three (3), Four (4) and Nine (9), Water Park Addition, to the City of Gold Hill, Jackson County, Oregon. (Being the property of the party of the first part lying on the west bank of Rogue River between the Pacific Highway Bridge and the City Boundary and between the River and Sams Valley Highway.)

2. Power site plant and equipment of party of the first part located in lot nine (9) in Water Park Addition to the City of Gold Hill, Jackson County, Oregon, together with the power distribution system now owned by party of the first part.

3. All water rights owned by the City. Said water [35] rights to include among others the following:

(a) Adjudicated water right of Oregon Water & Power Company to two hundred and twenty (220) cubic-feet per second of the waters of Rogue

River for the development of seven hundred and fifty (750) theoretical horse-power by diversion at a point in the northeast quarter of the northwest quarter (NE¼ NW¼) of section fifteen (15), township thirty-six (36) South, Range three (3) west, Willamette Meridian, with a priority of 1899.

(b) Water right obtained by permit from the State Engineer of the State of Oregon, No. 3275, on application No. 5410, February 20, 1917, for one hundred forty-seven (147) cubic feet per second of the waters of Rogue River for the development of five hundred (500) theoretical horse-power at a point of diversion in the northwest quarter (NW¼) of section eleven, township thirty-six (36) south, range three (3) West, Willamette Meridian.

(c) Water right obtained or to be obtained under application No. 9738 filed August 6, 1924, for the appropriation of one hundred and ninety (190) cubic-feet per second of the waters of Rogue River, at a point south seven degrees (7°) west twelve hundred fifty (1250) feet from the quarter section corner at a point in the northwest quarter (NW¼) of section fifteen (15), described as south seven degrees (7°) west twelve hundred fifty (1250) feet from the quarter section corner between sections ten (10) and fifteen (15), township thirty-six (36) south, range three (3) west, Willamette Meridian, with enlargement application under same number filed January 14, 1926, for seven hundred and ninety (790) cubic-feet per second additional, making an aggregate appropriation applied for of nine hundred and eighty (980) cubic-feet per second.

(d) Water right, or the interest of party of the first part in the water right, adjudicated to Nielson and [36] McClure for seventy-five (75) cubic feet per second with a priority as of 1879, the point of diversion being indicated as in lot three (3), section eleven (11), township thirty-six (36) south, range three (3), West, Willamette Meridian.

TO HAVE AND TO HOLD the said property and rights therein and thereto for the term of five (5) years from the date hereof, for the sum of one hundred dollars ($100.00) per month, which said rental the party of the second part agrees to pay as aforesaid, time being in all things the essence of this agreement;

PROVIDED, HOWEVER, that should legal complications develop whereby the party of the second part is unable to develop or operate the power properties for the purpose for which this lease is made, or should there be a failure of any of the above described water rights whereby party of the second part shall fail to obtain the use of at least 1347 second-feet of water, then the party of the second part may, at its option declare this lease void, and it shall thereupon be absolved from the payment of any further rentals, but in that event all improvements made upon or in connection with said power plant, and all additions or betterments to or of the same, shall, together with the land hereby leased, revert unto the party of the first part free and clear of all encumbrance created by party of the second part, and free from mechanics' and other statutory liens.

Inasmuch as the party of the first part only leases hereby such interest as it has in said land, and other property, the party of the second part may prosecute and defend in the name of party of the first part any action, suit or proceeding necessary to protect, retain, or acquire title to any portion of said property, or rights, or to protect the same against the claims of any other person whomsoever, and upon any termination of this lease the party of the first part shall in [37] nowise be liable unto the party of the second part for the repayment of any rental the second party may have paid nor for any damage, loss, or liability by reason of any defect in the title to any of the said property, and all expense incidental to the prosecution or defense of any legal proceeding connected with any of the matters herein contained shall be borne by the party of the second part without recourse against the party of the first part.

Pursuant to the vote of the electors of said City of Gold Hill, the party of the first part herein, and for valuable consideration to the party of the first part in hand paid by the party of the second part, receipt whereof is hereby acknowledged, the party of the first part covenants with the party of the second part that it will at any time during the five (5) year period aforesaid, sell, assign, transfer, and convey unto the party of the second part all its right, title and interest in and to all of the premises and property hereinbefore described and referred to for the sum of twenty-two thousand six hundred dollars ($22,600.00), this agreement is intended as being an exclusive option unto the

party of the second part, but if the party of the second part, shall, within the period aforesaid, give notice unto the party of the first part of its intention to exercise said option of purchase and to pay the purchase price aforesaid, then if the party of the first part shall so elect, the party of the second part shall, in lieu of the payments of case aforesaid, pay an amount of money sufficient to complete the payment of the principal amount of the bonds outstanding heretofore issued by party of the first part for the purchase price of the property aforesaid, and pay all interest that may thereafter mature on said bonds, but in either event all moneys paid as rental under the provisions of the foregoing lease shall apply as payments on the purchase price of said premises and property, providing said option is exercised, and the balance of the [38] purchase price paid in either of the methods aforesaid.

As further consideration for said lease and option and so long as said lease shall be in full force, and at all times thereafter, should the party of the second part acquire title to said premises and property and all of the city's interest and right in said property under said option, the second party shall and will supply, pump and deliver into the mains of the party of the first part, at the pumping plant, free of charge, all the water which may be required for domestic and municipal uses within said city, and provided further that the second party will proceed without unreasonable delay, at its own expense and without cost to the city, to put the said power plant into operation, and party of the second part agrees

that during the time the present plant is in operation it will furnish free to the party of the first part for municipal lighting such amount of power as is now *d*onsumed by the city, and upon the installation of a larger power plant than that now upon the premises, the party of the second part will furnish electric power to the city to an amount of twenty kilowatts, for municipal use only and free of charge; and should any additional power and light be required for municipal lighting and power by party of the first part, the same will be supplied by the party of the second part at once cent per kilowatt hour, and the same shall not be subject to any increase of rate by any superior, state, or other authority.

It is agreed and provided, however, that should party of the first part elect to have the purchase price of said premises paid in cash, then and in that event the money so received by the first party shall be kept in a special fund and used only for the purchase price of said power plant, which, at this time aggregate approximately twenty-two thousand dollars ($22,000.00) principal. It being understood, that party of the first part will convey, transfer and assign good and clear title, and free from all encumbrances, to all property [39] covered hereby should the option be exercised.

All the provisions herein contained shall apply to and include the successors in interest and assigns of each of the parties hereto, and should the party of the second part make default in the performance of any covenant, condition, or other provision con-

tained herein, on its part to be performed, then such default shall be ground for forfeiture of all rights of the party of the second part hereunder, and upon notice of default and the failure of the party of the second part to remove such default within sixty days from the date of notice mailed and addressed to it at Gold Hill, Oregon, then the party of the first part may declare a forfeiture of all the rights of the party of the second part hereunder, and all such rights, together with said property, and all betterments, improvements and additions thereto shall revert to and become the property of the party of the first part free from any claim of right of interest or demand of the party of the second part, its successors in interest or assigns,—it being expressly understood and agreed between the parties hereto, that should default continue for ten (10) days after notice is given as above provided, the party of the first part may, without further notice and within any legal proceeding, takes possession of said power plant and operate the same.

IN WITNESS WHEREOF, the parties hereto have caused their respective corporate names to be signed and their corporate seals to be affixed hereto in duplicate, this the day and year first above written.

THE CITY OF GOLD HILL. (Seal)
By R. E. COOK, Mayor.
Attest: JOHN HAMMERSLY, Auditor.

In the presence of
P. H. MEYERS.
HARRY CHILDERS.
BEAVER PORTLAND CEMENT COMPANY.
By W. H. MUIRHEAD, Vice-President.
Attest: BUELL C. NELSON. (Seal)
R. E. COOK.
FRED HICKMAN.
(Verification omitted.)

Answer. Filed September 18, 1930. [40]

AND AFTERWARDS, to wit, on Friday, the 19th day of September, 1930, the same being the 60th judicial day of the regular July term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause to wit:

[Title of Court and Cause.]

ORDER ON MOTION TO DISSOLVE INJUNCTION.

Now at this time comes, on for hearing the motion of the defendants for an order dissolving the restraining order and injunction heretofore issued and for the assessment of damages for the wrongful issuance of the order, the defendants appearing by John K. Kollock, for the motion, and the plaintiff appearing by A. E. Reames, resisting said motion,

and the court having heard the argument of counsel and it appearing that the motion should be determined after the hearing of the evidence in the cause,—

IT IS ORDERED that this matter be and the same is hereby continued until the trial of said cause at the Medford Term of this Court, in October, 1930. The cause is set for trial to follow the Criminal Docket at that term.

R. S. BEAN,
Judge.

Filed September 19, 1930. [41]

AND AFTERWARDS, to wit, on the 23d day of April, 1931, there was duly filed in said court, a replication, in words and figures as follows, to wit:

[Title of Court and Cause.]

REPLICATION.

Comes now the plaintiff and without waiving any of its rights under the bill of complaint herein, and without waiving the right to require the defendants to prove the affirmative allegations of their answer, and in reply to such allegations admits, denies and alleges, as follows:

I.

Replying to that portion of Paragraph V of the further and separate answer of the defendants wherein they allege that on October 5, 1926, the

defendant, City of Gold Hill, as plaintiff, instituted in the Circuit Court of the State of Oregon for Jackson County, an action to condemn certain portions of plaintiff's Lot No. 1, upon which said city proposed to construct a dam across Rogue River and wherein the defendants allege here that this plaintiff, in its answer in said condemnation proceedings, alleged that it was a public service corporation; that it had acquired said Lot No. One (1) for use in connection with the manufacture of electrical energy; to furnish power to consumers and to the public as a public utility, and that it had determined to construct upon said property a hydro-electric plant for the manufacture of such electric power and was holding the property until the market should require such power. This plaintiff admits said allegation and alleges that said condemnation action went to final judgment on the 13th day of June, 1928, at which time a judgment was duly made and entered in said court and [42] cause in favor of this plaintiff, the defendant in said action, and said judgment is a final adjudication upon all of the issues involved in said action. That the same has never been appealed from, modified, or reversed, and is still in full force and effect. So that no construction work was possible during the pendency of that litigation.

II.

Replying to that portion of said Paragraph V in which the defendants here allege that this plaintiff on the 13th day of September, 1928, instituted in

this court an injunction suit against the defendants herein in which it alleged that this plaintiff here had so acquired said Lots one (1) and two (2), Section fifteen (15), Township 36, South of Range 3 West for the purpose of manufacturing such power needed by it for such public purposes and would utilize such property for such purposes when the market in its territory served justified, which in any event would be only a short time, this plaintiff admits said allegations, but alleges that the defendants here appealed from the judgment and decree that had been entered in that suit so that final decree was not entered therein until practically the year 1930, the exact date being the 20th day of December, 1929. In that case the defendants here enjoined from further construction of cement works upon plaintiff's said property; so that no construction work would have been practical during that period in which said litigation was so pending.

III.

That following the entry of that decree, to wit, on the 21st day of July, 1930, the defendants exploded the dynamite and committed the acts recited in the bill of complaint herein resulting in the institution of this suit to prevent injury to the plaintiff by the removal of the rocks shattered by such [43] blasting and to prevent further blasting or changing of the course of said stream, and except as herein admitted and alleged, and except as alleged in the

complaint, the plaintiff denies all of the allegations of said further and separate answer.

A. E. REAMES,
Attorney for Plaintiff,
412 Liberty Bldg.,
Medford, Oregon.

(Verification omitted.)

Filed April 23, 1931. [44]

AND AFTERWARDS, to wit, on the 11th day of March, 1932, there was duly filed in said court an opinion in words and figures as follows, to wit:

[Title of Court and Cause.]

OPINION.

JAMES ALGER FEE, District Judge.—Plaintiff, which is engaged in the business of furnishing electric power, and possesses the right of eminent domain, as a public service corporation, and the City of Gold Hill are the owners of lands on the opposite sides of the center of the Rogue River, a non-navigable stream in Oregon. Defendant Cement Company is operating under executory contracts to purchase the lands of the city.

The parties have been in previous litigation in this court, which terminated in a decree entered in accordance with a mandate of the Circuit Court of Appeals, which enjoined defendants from building a dam across the river, onto lands of the plaintiff

which extended to the center of the stream, except that defendants were permitted to exercise an easement upon the site of an old pier. The decree, pursuant to the direction of the Circuit Court of Appeals in the City of Gold Hill vs. California-Oregon Power Company, 35 F. (2d) 317, 319, contained the following reservation:

> "That said decree is without prejudice to such rights, if any, as either party to this suit may have under the principles of riparian rights or by appropriation. The water rights, if any, of the parties to this suit, whether claimed under the riparian doctrine or under the doctrine of appropriation, are not determined." [45]

After this decree was entered and on July 21, 1930, the defendants, acting entirely upon the lands of defendant city, blew up a portion of the bed of the river upon that side of the thread of the stream, and were intending to clean out the excavation so as to permit the waters to flow freely into the canal, through which the city had heretofore diverted part of the water awarded, under the adjudication of the Rogue in the State Courts, to its predecessors in interest. In addition defendants held certain permits from the office of the State Engineer of Oregon to make further appropriations of the waters of the stream.

Plaintiff sought and obtained a temporary injunction against further action upon the site by defendants, and seeks a permanent injunction to prevent them from lowering or changing the bed of the

river, and from lessening the flow of the water of the stream, and from changing the thread or current, and from blasting and clearing out the debris from the previous blasts.

Testimony was taken before the late Judge Bean, and upon his death the testimony was taken anew, although the former record was introduced by stipulation as evidence.

Plaintiff is not entitled to enjoin defendant from blasting so long as there is no nuisance or trespass upon the real property of plaintiff, nor even consequential injury to the land by concussion. On the other hand, this equitable remedy is not available against excavation upon lands of the defendant, where there is no deprivation of the lateral support for plaintiff's soil. Research discloses the doctrine of lateral support has no relation to flowing waters, and it is doubtful that subterranean waters are controlled thereby. See Popplewell vs. Hodkinson, L. R. 4 Exch. 248. [46]

Complaint is made that the boundary of the plaintiff's land will be changed by the diversion of the water into the canal. But the thread of the stream will not change by a sudden or violent aversion of the water. See Wykoff vs. Mayfield, 130 Ore. 687; Philadelphia Co. vs. Stimson, 223 U. S. 605, 624. The logic of the situation is the same whether the diversion be effected by natural or artificial means. The essential principle is that access to the water should be preserved. Besides in states where the appropriation doctrine is recognized, the right to object to a turning away of the waters depends upon

the question of whether beneficial use has been made by the objector.

The only real question in this case therefore is whether plaintiff is entitled to injunction to prevent diversion of the waters of Rogue River by virtue of its ownership of the land to the center thereof, because neither the blasting nor the excavation will, according to the proof, have any effect upon the plaintiff's land except to divert the water, which defendants claim the right to use.

It is patent, then, that plaintiff is not entitled to equitable relief, unless it has a right to have the water upon its land remain at its natural height, undiminished in quantity.

The decree in the previous case described plaintiff's land as extending under the stream to the center thereof, and as riparian thereto; but it is perfectly clear there was no intention of preventing defendants from diverting the water to which they were entitled by virtue of appropriation, nor of attaching the right of undiminished flow to the lands of plaintiff, by describing them as riparian.

At the outset plaintiff is confronted with the axiom that equity will not interfere to protect an abstract right where no irreparable damage has been done.

Under present conditions, since the need for water and the power of water arises at great distances from the original [47] stream*ed*, there is visible, even in jurisdictions not possessing arid lands, a subtle syncretism of the doctrines of common-law riparian rights and of appropriation. It is by no means cer-

tain that, even in jurisdictions which hold fast to the common law, an injunction would be granted with no more showing of damage than appears in this record.

> "These principles, however, are subject to the modification that the diversion, if for a use reasonable in itself, must cause actual perceptible damage to the present or potential enjoyment of the property of the lower riparian proprietor before a cause of action arises in his favor." Stratton vs. Mr. Harmony Boys School, 216 Mass. 831, 103 N. E. 87.

In theory the rigid rules of the common law should bend to the customs and necessities of the communities in which they operate. In the arid states of the west, therefore, the modification may be urged with more cogency.

> "We deem the true rule to be that the lower riparian owner seeking the injunction must show some real, material and substantial damage to justify a court of equity in enjoining an upper claimant from his actual beneficial use of the water; and that, too, regardless of the fact as to whether such upper claimant claims his right to the use of the water as an appropriator or as a riparian owner using more than his just proportion of the water, after taking into consideration the equal correlative rights of the other owners, under the strict construction of the common law doctrine. And we will add that, owing to the great need and scarcity of waters in the western country, and the neces-

sity that all of the available water supply be put to some beneficial use or purpose, the courts are coming rapidly to this view." Kinney, Water Rights, Sec. 1613.

In an early case the Supreme Court of Washington, which is a state adhering closely to the common-law doctrine, held that before a riparian owner could restrain an appropriator from interfering with the free and unobstructed flow of a stream, the former must show a beneficial use of the water of the stream by himself. Northport Brewing Co. vs. Perrot, 22 Wash. 243; 66 Pac. 403.

"The beneficial use of these waters by appellant could not be enjoined if such use disturbs merely a naked legal right of respondent and subjects it to no injury. The general purpose of a prohibitory injunction is to restrain the doing of an act which will cause irreparable injury when there is no adequate remedy [48] at law. Equity, so far as we know, has never taken jurisdiction to restrain the beneficial use of water required for the irrigation of arid lands when there is no necessity for such restraint nor consequent injury to others." Coulee Livestock Co. vs. Pluvius Devel. Co., 75 Wash. 109, 134 Pac. 684.

These decisions have been quoted and affirmed in the more recent case of Brown vs. Chase, 125 Wash. 542, 553, where it is said:

"It is not to the interest of the state that the water of a non-navigable stream should be

idle or going to waste because one of its citizens, having a preference right to its use, unjustifiably neglects to avail himself thereof, while others stand ready and willing, if permitted, to apply it to the irrigation of their own lands."

It must be remembered in this connection that this is not a contest between a riparian owner and a stranger to the stream. The city is as much a riparian proprietor as the plaintiff. There may be others also who claim upon the Rogue River as riparian proprietors. Under the doctrine enunciated by strict common-law courts, all such owners of the banks are tenants in common of the waters, and the rights of all must be adjudicated at the same time in order to arrive at a proper conclusion. See Caviness vs. La Grande, 60 Ore. 410.

As far as plaintiff's claim of prospective use and development is concerned, it is not entitled to weight, for the history shows that plaintiff has held this land itself since 1921, and has attempted no beneficial use of the waters, and that the Condor Water & Power Company was making the same claim and promise as to these lands by its complaint filed in 1906. See Defendants' Exhibit "EE."

Certainly if there is any virtue at all in the theory of state control of municipal law relating to waters, this court should not issue an injunction upon this record, where the highest court of the state has declared that the riparian owner has no right to let the stream run to waste and prevent proper development. [49]

"A riparian proprietor cannot lay claim to the undiminished flow of a stream, without actual use, simply because it adds beauty to the outlook. 4 Kinney Irr., Sec. 1975. A riparian owner's right to the water for irrigation is limited to the amount of water needed and used, so that to determine that fact the amount of land irrigated, the character of the soil, and the amount of water needed per acre, must be shown." In re Willow Creek, 74 Ore. 592.

The fact that there has been no use of the waters of Rogue by plaintiff determines the present controversy.

There are, moreover, other compelling reasons why injunction should not issue. Equity requires the property right for which protection is sought to be clearly established. But plaintiff proved no usufructuary right to the waters of the Rogue whatsoever. Plaintiff acquired the real property in 1921. The legislature of Oregon abolished riparian rights to water in 1909 in so far as such rights had not already vested. This step the state had a right to take.

After a careful analysis of the decisions of the United States Supreme Court, and after quoting, among other decisions, Kansas vs. Colorado, 202 U. S. 46, to the effect that:

"It may determine for itself whether the common law rule in respect to riparian rights, or that doctrine which obtains in the arid regions of the west, of the appropriation of water for the purposes of irrigation, shall con-

trol. Congress cannot enforce either rule upon any state."

Judge Wilbur, the Senior Circuit Judge of the Ninth Circuit, concludes in U. S. vs. Stockholders Corporation, 52 F. (2d) 322, 329:

> "Without again citing specific statutes or decisions, a general view of the decisions and of the federal legislation leads to the conclusion that it has been the consistent policy of the government of the United States to allow the citizens of the various states to work out their own system of law in relation to water rights, without intervention or adverse legislation by the federal government."

The mere fact, therefore, that plaintiff owns land to-day bordering on a stream in Oregon has no tendency whatever to prove he is the owner of any rights in the flow thereof. [50] If plaintiff desired to raise the question of vested riparian rights under the common law, he should have shown that water flowed unappropriated in this stream past this parcel of land, at some time when the municipal law of the state permitted such rights to the flow of the stream to become crystallized as private property. Equity requires a property right sought to be protected to be clear and established. But plaintiff proved no property right in the usufruct of the waters of the Rogue whatsoever. It is not then entitled to injunction.

These rights to the use of the water at this point were in litigation in the case of Condor Water &

Power Co., a predecessor of the plaintiff, vs. Gold Hill Canal Co. The decree, dated May 3, 1917, introduced by plaintiff, Exhibit 15, enjoined defendants from building a dam entirely across the river, but, as explained by the judgment-roll introduced by defendants, did not enjoin defendants from diverting practically the entire stream under claim of the appropriations, some of which apparently antedated plaintiff's patent, as against a claim by the plaintiffs, and appropriative rights existing in itself. See Exhibit.

The late Robert S. Bean says in his opinion upon which the decree is based:

> "The pleadings raise an issue as to the quantity of water to which the defendants are entitled, but no evidence on the point was offered by the complainant, nor was it referred to at the argument. I therefore conclude that the defendant's claim as set up in the answer and sought to be supported by notices of appropriation given in evidence is, for the purposes of this suit, concluded." See record Condor Water & Pr. Co. vs. Gold Hill Canal Co. et al., No. 3098, introduced as Defendants' Exhibit "EE." [51]

This decree was not pleaded as *res adjudicata*, but it is apparently admitted that the suit was between predecessors in interest of the plaintiff and defendant city. (Pages 91, 92 Trans.)

The plaintiff is bound to prove a clear title to the water rights of this stream before it can maintain this case. Oregon had a right to adopt any rule

of waters which it chose. Proprietary rights to the unlimited flow of water past the land could not be acquired in Oregon after the decision of Hough vs. Porter, 51 Ore. 318, decided May 19, 1908, and certainly not after the enactment of the Oregon Water Code in 1909. The record of this case of Condor Water & Power Co. vs. Gold Hill Canal Co., above referred to, indicates that the plaintiff had no riparian rights in 1911 upon these lands.

Even under the strictest doctrine riparian rights to undiminished flow would not attach to lands which were not patented until the waters of the stream had been appropriated. Therefore, as to water appropriated prior to plaintiff's patent it could have no riparian rights. If it had no riparian rights in 1911, the date of the decree, it could acquire none thereafter, even if the water were abandoned by the appropriator, because the rule of waters had changed in 1908–9.

Plaintiff had the burden of clearly proving its riparian rights in the water, for it insisted it had been deprived of property without due process of law. The court cannot protect property, unless it is proven to have existed. Plaintiff did not acquire this land itself until 1921, at which time riparian rights did not exist under the property rule obtaining at that time in the state, and there is not a scintilla of proof that there had ever been any incident to this land, and the decree of 1911 seems to indicate conclusively that there was none.

Another reason of the noninterference of equity in this cause is found in the fact that another ade-

quate and [52] complete remedy exists under the Oregon Water Code. It is highly probable that it was the intention of the Circuit Court of Appeals to suggest this method of definite determination, by the language of the opinion in the previous case, City of Gold Hill vs. California-Oregon Power Co., 35 F. (2d) 317.

If plaintiff has riparian rights to this land, a scientific determination could have been made by the procedure prescribed by the state law. The statute provides for a proceeding *quasi in rem* and directs that notice be sent to

> "Each person, firm or corporation owning or being in possession of lands bordering on and having access to said stream or its tributaries." Oregon Code, 47–603.

In such proceedings the state courts can and do protect riparian rights, if vested, before the public character of water was expressly declared. See In re Willow Creek, 74 Or. 592, 625; Oregon Code, 47–603.

It has further been held that the statutes are constitutional, and afford due process of law; Oregon Lumber Co. vs. East Forks Irr. Dist., 80 Ore. 568; Pacific Livestock Co. vs. Oregon Water Board, 241 U. S. 440. See also Humboldt Land & Cattle Co. vs. Allen, 14 Fed. (2d) 650.

In Pacific Livestock Co. vs. Silvies River Irr. Co., 200 Fed. 487, the Circuit Court of Appeals reversed the Circuit Court of the United States, for the District of Oregon, in a suit between a riparian owner,

who claimed he was beneficially using the waters of said river by reason of their tendency to overflow his land, against persons attempting to appropriate above him, because the lower court had issued an injunction restraining defendants there from diverting the waters of the Silvies River, but further granting them the right to apply for a vacation of the injunction if it should thereafter "be determined in some appropriate proceeding that there is any surplus water subject to appropriation by them." The Circuit [53] Court of Appeals says:

> "From the decree taken in connection with the opinion it is, we think, quite evident that the court below was of opinion that as between the appellant and the appellees certainly the river carried some surplus water during the high stages, which should be left to future ascertainment. That being so, and the laws of the State of Oregon in force at the time of the decree appealed from, recognizing the rights of riparian properties to a limited extent only, and providing for the right of appropriation of water of the non-navigable streams of the state for beneficial uses, we are of the opinion that the decision here in question should be reversed and the cause remanded for further proceedings, in accordance with those laws."

In accordance with that suggestion a determination of water was made on the streams by the state court, in Re Waters of Silvies River, 115 Ore. 27, 129, 133, where it said "The federal court invited this proceeding."

It is further patent the intent of the Circuit Court of Appeals in the previous litigation between these parties was to have the water appropriately adjudicated before injunction was sought, in accordance with its previous decision above cited, for it was said:

> "In view of the pleadings and the course of the trial, we are of the opinion that the decree herein should be without prejudice to an *adjudication of the relative rights of the parties* (italics ours), as riparian owners or otherwise, to the use of the waters of the stream, when and if, in the future, controversy shall arise in respect thereto." City of Gold Hill, Ore., vs. California-Oregon Power Co., 35 Fed. (2d) 317, 319.

This utterance is binding in the instant controversy, and clearly indicates, on the previous appeal the Circuit Court of Appeals directed application for the adequate and [54] complete remedy existing in the forum provided by the state law.

If there is any doubt about the nature and extent of defendant's rights, or whether plaintiff has any further than the decree here awards, it seems the proper procedure is before the State Water Board. See Pacific Livestock Co. vs. Balcomb, 101 Ore. 233.

But the Oregon reports show that the waters of the Rogue have already been adjudicated by the state courts. In re Waters of Rogue River, 124 Ore. 7. The decree itself was introduced in evidence for the limited purpose of proving part of

defendant's rights upon this very land, and to prove that a right by appropriation was adjudicated to California-Oregon Power Company, plaintiff's corporate predecessor. It was shown that plaintiff, notwithstanding it claims vested riparian rights, is taking advantage of the beneficial doctrine of appropriation by using this right awarded to its predecessor. This in itself would seem to preclude a claim of riparian rights of lower lands. Caviness vs. La Grande Irr. Co., 60 Ore. 410.

The decree was not pleaded as *res adjudicata*, however, nor can the court from the record determine whether the plaintiff's predecessor was served while it held plaintiff's present property, nor whether it had that property when the appropriation was made, in which event the riparian rights above referred to, were probably destroyed. Williams vs. Altnow, 51 Ore. 275, 300. On the other hand, plaintiff prays an injunction from this court after a special proceeding which purports to adjudicate all water rights upon the stream, and it does not present any adjudicated right for the court to protect.

> "Such decree shall in every case declare, as to the water right adjudicated to each party, whether riparian or by appropriation, the extent * * * together with such other conditions as may be necessary to define the rights and its priority." Oregon Code, 47–623. [55]

In the present state of the record this litigation is premature and almost useless. Plaintiff must be relegated therefore to another forum to have its

rights defined before this court will protect them by injunction.

The evidence shows, however, that under certain circumstances the automatic operation of the mill which defendants intend to build might entirely dry up the river, and since the plaintiff has based its right upon the maintenance of the thread of the stream, and defendants concede some water must be allowed to flow in the present bed, the court will enjoin the reduction of the water in the bed below a minimum flow, which will be based on the calculations now in evidence, so that this litigation will not be entirely fruitless, and so plaintiff will not be totally deprived of access to the water and will enjoy to the fullest extent whatever residual rights may be guaranteed by the modified riparian doctrine.

But plaintiff must be denied an injunction of broader scope on account of the fact that no adequate proof was furnished for the exercise of such an extraordinary remedy, first, because no beneficial use of the water is shown by plaintiff, and second, because, although it claims the state doctrine deprives it of property without due process of law, plaintiff did not prove any property whatsoever in the waters of the stream, as an incident to the ownership of the land or otherwise, and third, because an adequate remedy is provided by the laws of the State of Oregon whereby the relative rights to waters may be scientifically determined, but the plaintiff has either not had its rights determined in

such a proceeding, or has failed to plead or prove the results.

The court awards costs to the defendants.

Filed March 11, 1932. [56]

AND AFTERWARDS, to wit, on the 11th day of March, 1932, there was duly filed in said court findings of fact and conclusions of law in words and figures as follows, to wit:

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled matter having come on for trial before the Honorable James Alger Fee, Judge of the District Court of the United States, for the District of Oregon, upon the pleadings and evidence introduced on behalf of parties, and the court having considered the same, and the arguments of respective counsel, makes and enters the following

FINDINGS OF FACT.

I.

That during all the times since the year 1921 hereinafter mentioned plaintiff, has been, and now is, a public service corporation possessing the power of eminent domain, and organized and existing under and by virtue of the laws of the State of California, and authorized and empowered to do business in the State of Oregon under and by vir-

tue of the laws thereof; that the plaintiff has complied with all the laws of the State of Oregon governing a public utility corporation, and has regularly and duly filed its tariffs with the Public Service Commission of the State of Oregon.

II.

That on the 20th day of April, 1885, patent from the United States was duly issued to Francis Marion Friedenburg for lots 1 and 2, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, in Jackson County, Oregon, and that title to said property was vested in the plaintiff through mesne conveyance [57] from the said Francis Marion Friedenburg March 11, 1921, and that the plaintiff has been in continuous possession thereof since said last-mentioned date; that said lands abut on and adjoin Rogue River, a non-navigable stream in Jackson County, Oregon, and that plaintiff's ownership extends under the waters of said river, and includes the bed thereof to the thread of the stream.

III.

That the defendant, City of Gold Hill, is a municipal corporation incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and is the owner, and in possession, of lots 5, 6, 7 and 8, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, in Jackson County, Oregon, abutting and adjoining Rogue River, and directly across said river from the real property of the plaintiff, hereinabove described, and the ownership and title of said defend-

ant includes the bed of said river to and west of the thread of the stream, and that defendant is the successor in the ownership thereof of Gold Hill Canal Company, and Oregon Water and Power Company.

IV.

That in and by the decree in the proceedings in the Circuit Court of the State of Oregon for Jackson County entitled "In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries," entered of record in said court on the 26th day of April, 1919, there was adjudicated to Neilson and McClure, Proof 27, Volume 1, Priority 1879, seventy-five (75) second-feet for power (250 horse-power) Braden ditch; water to be returned to the stream at or immediately below the place of use; Description of place of use: Lot 3, Section 11, Township 36 S., Range 3 W., Willamette Meridian, Jackson County, Oregon; that the rights of said Neilson and McClure passed by mesne conveyance to, and are now vested in, [58] defendant City of Gold Hill, of which right of appropriation twenty-five (25) cubic-feet per second have been conveyed by the City of Gold Hill to Gold Hill Irrigation District, said twenty-five (25) second-feet being diverted at or near the original point of diversion, leaving net appropriation under said adjudication of fifty (50) cubic-feet per second; that in and by said decree there was adjudicated to Oregon Water and Power Company two hundred and twenty (220) cubic-feet per second of the waters of Rogue River, with the point of

diversion at a point in the NE¼ of the NW¼ of Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, and for application to a beneficial use within said section; that the rights so adjudicated have passed by mesne conveyance to, and are now vested in, defendant City of Gold Hill; that certain of the waters covered by such adjudication have been continuously, for a period of years, applied to a beneficial use in accordance with the terms of said adjudication.

V.

That permits have been heretofore issued to defendant City of Gold Hill by the State Engineer of the State of Oregon under the provisions of the law of 1909 known and described as "The Water Code" for additional waters of the Rogue River to the extent of eleven hundred and twenty-seven (1127) cubic-feet per second.

VI.

That defendant Beaver-Portland Cement Company is a private corporation incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and holds all of the above-described real property, adjudicated water rights and permits in the State Engineer's office of the State of Oregon under an executory contract of sale from defendant City of Gold Hill, and that the defendant City of Gold Hill, [59] and defendant Beaver-Portland Cement Company, are, and have been since the issuance of said permits, proceeding in the construction of works for the ap-

propriation of the eleven hundred and twenty-seven (1127) cubic-feet per second, described in the last preceding finding claiming to be proceeding under the terms and conditions of said permit, and under the terms and conditions of its contract with defendant City of Gold Hill.

VII.

That no testimony has been introduced tending to show that at any time since the date of patent to plaintiff's predecessor, Francis Marion Friedenburg, have the owners of lots 1 and 2, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, applied the waters of Rogue River to a beneficial use on the said real property, or made any attempt to appropriate said waters under the law of appropriation in force, either by posting and recording notice of appropriation under the law in force prior to 1909, or by applying for an adjudication of water rights at the site in controversy, or by filing an application with the State Engineer for a permit to use and apply said waters; that in and by the decree in the matter of adjudication of the waters of Rogue River in the Circuit Court of the State of Oregon for Jackson County there was adjudicated to California-Oregon Power Company, plaintiff's predecessor in interest, the right to appropriate the waters of Rogue River in the development of power at a point known as Gold Ray, some three miles above the property of the plaintiff described in the complaint and in these Findings, and being lots 1 and 2, Section 15,

Township 36 S., Range 3 W., of the Willamette Meridian.

VIII.

That on the 10th day of September, 1906, there was instituted in the Circuit Court of the State of Oregon for [60] Jackson County by Condor Water & Power Company, a corporation, predecessor in interest and in the ownership of the real property hereinabove described as owned by the plaintiff, a suit in equity against Gold Hill Canal Company, a corporation, the predecessor in interest and title of defendant City of Gold Hill, a suit in equity involving the right of Gold Hill Canal Company to construct a dam entirely over and across Rogue River. This suit in equity was subsequently removed to the United States District Court for the District of Oregon, and was determined by decree made and entered in said last-mentioned court May 3, 1911. In the complaint in that suit the plaintiff alleged that lots 1 and 2, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, being the real property described in the complaint in the present suit as the property of the plaintiff, had been acquired by the plaintiff therein, to wit: the Condor Water & Power Company, for the purpose of carrying on its objects, purposes and as a public utility corporation, and that plaintiff needed said real property, and the water rights belonging thereto, for the purposes of which said corporation was organized, and that the demand for electric current and water for irri-

gation was increasing and the plaintiff would be required to meet said demand.

That neither the Condor Water & Power Company, plaintiff in said action, nor any of its successors to and including the plaintiff in the pending litigation, The California Oregon Power Company, have made any attempt to construct works for the application of the waters of the Rogue River to a beneficial object.

IX.

That prior to the 21st day of July, 1930, the defendant Beaver-Portland Cement Company, under and in accordance with the terms of its executory contract with defendant City of Gold Hill, was proceeding to construct from the west bank of Rogue River on the property of defendant City of Gold Hill, a wing-dam extending [61] to, but entirely west of the thread of the stream.

X.

That on the 21st day of July, 1930, for the purpose of developing the power from the waters of Rogue River to which the defendant City of Gold Hill claimed to be entitled by adjudication and by permits from the State Engineer of the State of Oregon, and to permit the free flow of, and thereby to utilize, the waters of Rogue River to be diverted by the wing-dam in process of construction, and to procure an available supply of broken rock for the erection of a structure on the site of the old crib, as defined by said final decree in case E.-8991, defendant Beaver-Portland Cement Company exploded certain charges of dynamite in the rock

reefs, obstructing the flow of the waters of Rogue River on the west side thereof, said explosion being entirely west of the thread of the said stream, and that by such explosion the reef rocks were broken and shattered, and the rocks so broken and shattered lie in the channel of Rogue River, west of the thread of the stream.

XI.

That the said explosions and shattering of rock did not remove lateral support from the rock and soil of plaintiff lying under the waters of Rogue River and constituting the bed thereof, nor do any injury irreparable, or otherwise, to any of plaintiff's property.

XII.

That plaintiff has failed to prove any property rights vested, or otherwise, in or to the waters of Rogue River at the point in controversy, or to the usufruct thereof, except that the plaintiff did prove that it is the owner and in legal possession of its said lands abutting upon Rogue River and extending under the [62] waters thereof to the thread of the stream.

XIII.

That the removal of the shattered rock, the result of the exploding of dynamite by defendant Beaver-Portland Cement Company, and now lying in the channel of Rogue River on the west side of the thread of the stream, and upon the bed of the stream west of the thread thereof, and the removal by the defendant of further rock obstructions to the flow

of Rogue River entirely west of the thread of the stream, will not affect the location of the boundary between plaintiff and defendant City of Gold Hill, if such operations shall not be so conducted and the plant proposed to be constructed by the defendants shall not be so operated as to reduce the surface elevation of Rogue River at the point of diversion of the most northerly end of the wing-dam proposed to be constructed by the defendants from the west bank of Rogue River below an elevation of 1070.056 feet above sea level, as computed from the bench at Gold Hill, Oregon, as revised and corrected by the United States Geological Survey, such elevation being 1069 feet above sea level based upon the original approximate elevation indicated on said bench mark, the said point at which said surface elevation shall not be so drawn down below said elevation is a point immediately east of the point where the thread of the stream intersects a line 390 feet south of the north line of said Section 15, and parallel therewith; that neither the wing-dam nor the plant proposed to be constructed shall be so constructed, maintained or operated as to permit any of the waters of Rogue River to flow from the east channel thereof to the west channel below the above-designated point of diversion; that the said injunction against the defendants shall apply to the successors in interest of the defendants, and each of them, in the ownership or possession of lots 6, 7 and 8, Section 15, Township 36 S., Range 3. W., of the Willamette Meridian, and in the ownership, [63] possession or operation of

any electrical or other plant operated upon said lots for the manufacture of electricity and other power, and to the agents, servants and employees thereof, and all others acting in their aid or behalf.

And based upon the foregoing Findings of Fact, the court makes and enters the following conclusions of law:

I.

That the plaintiff is not entitled to any injunctive relief against the defendants, or either of them, prayed for in the complaint.

II.

That the temporary restraining order heretofore issued herein, should be discharged.

III.

That the thread of the stream is the boundary between the owners of land upon opposite sides of a non-navigable stream, and it is not changed merely because water is diverted in large quantities for irrigation or power use; it remains still at the center of the natural bed of Rogue River at the lowest natural stage of the waters; that plaintiff is entitled to access to the waters of Rogue River upon its said lands.

IV.

That the defendants, and each of them, should be enjoined from so constructing its proposed works, and/or from so operating such works when constructed as to reduce the elevation of Rogue

River at the point of diversion at the most northerly end of the wing-dam proposed to be constructed by the defendants from the west bank of Rogue River to the thread of the stream below [64] an elevation of 1070.056 feet above sea level as computed from the bench of the city of Gold Hill, Oregon, as revised and corrected by the United States Geological Survey, such elevation corresponding to 1069 feet above sea level based upon the original approximate elevation indicated on said bench mark, the said point at which said surface elevation shall not be so drawn down below said elevation being a point immediately east of the point where the thread of the stream intersects a line 390 feet south of the north line of said Section 15, and parallel therewith; that neither the wing-dam nor the plant proposed to be constructed, shall be so constructed, maintained or operated as to permit any of the waters of Rogue River to flow from the east channel thereof to the west channel below the above designated point of diversion; that the said injunction against the defendants shall apply to the successors in interest of the defendants, and each of them, in the ownership or possession of lots 6, 7 and 8, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, and in the ownership, possession or operation of any electrical or other plant operated upon said lots for the manufacture of electricity and other power, and to the agents, servants and employees thereof, and all others acting in their aid or behalf.

V.

That the defendants should recover of and from the plaintiff their costs and disbursements.

JAMES ALGER FEE,

Judge of the United States District Court for the District of Oregon.

Filed March 11, 1932. [65]

AND AFTERWARDS, to wit, on Friday, the 11th day of March, 1932, the same being the 5th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, presiding,—the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

No. E.-9126.

THE CALIFORNIA OREGON POWER COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of California,

Plaintiff,

vs.

BEAVER-PORTLAND CEMENT COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of Oregon, and CITY OF GOLD HILL, OREGON, a Municipal Corporation Existing Under the Laws of the State of Oregon,

Defendants.

DECREE.

The above-entitled matter having come on for hearing before the Honorable James Alger Fee, Judge of the District Court of the United States, for the District of Oregon, and the court having made and entered its findings of fact and conclusions of law,—

IT IS NOW, THEREFORE, ADJUDGED AND DECREED that the temporary restraining order heretofore issued herein, be, and the same is hereby, discharged and dismissed; that the plaintiff have no other relief herein, except as hereinafter especially decreed; that the defendants, and each of them be, and are hereby enjoined from so constructing its proposed works, and/or from so operating such works when constructed as to reduce the elevation of Rogue River at the point of diversion at the most northerly end of the wing-dam proposed to be constructed [66] by the defendants from the west bank of Rogue River to the thread of the stream below an elevation of 1070.056 feet above sea level as computed from the bench of the City of Gold Hill, Oregon, as revised and corrected by the United States Geological Survey, such elevation corresponding to 1069 feet above sea level based upon the original approximate elevation indicated on said bench mark, the said point at which said surface elevation shall not be so drawn down below said elevation being a point immediately east of the point where the thread of the stream intersects

a line 390 feet south of the north line of said Section 15, and parallel therewith; that neither the wing-dam nor the plant proposed to be constructed, shall be so constructed, maintained or operated as to permit any of the waters of Rogue River to flow from the east channel thereof to the west channel below the above-designated point of diversion; that this injunction against the defendants shall apply to the successors in interest of the defendants, and each of them, in the ownership or possession of lots 6, 7 and 8, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, and in the ownership, possession or operation of any electrical or other plant operated upon said lots for the manufacture of electricity and other power, and to the agents, servants and employees thereof, and all others acting in their aid or behalf.

It is also ADJUDGED AND DECREED that the defendants shall have their costs and disbursements herein taxed at $447.65.

JAMES ALGER FEE,
Judge of the United States District Court for the District of Oregon.

Filed March 11, 1932 [67]

AND AFTERWARDS, to wit, on Friday, the 11th day of March, 1932, the same being the 5th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, presiding,—the following proceedings were had in said cause, to wit:

[Title of Court and Cause.]

MINUTE ORDER—MARCH 11, 1932—ORDER CONTINUING IN FORCE PRELIMINARY INJUNCTION.

The court having filed herein its findings of fact and conclusions of law and having rendered its opinion,—

IT IS ORDERED that the preliminary injunction heretofore issued in this cause be continued in full force for a period of fifteen days to permit the said plaintiff to perfect an appeal from the said decree.

JAMES ALGER FEE,
Judge.

Filed March 11, 1932. [68]

AND AFTERWARDS, to wit, on the 23d day of March, 1932, there was duly filed in said court a petition for an order allowing appeal, in words and figures as follows, to wit:

[Title of Court and Cause.]

PETITION FOR ORDER ALLOWING APPEAL.

To the Honorable JOHN H. McNARY and JAMES ALGER FEE, Judges of the Above-entitled Court:

The California Oregon Power Company, a Cali-

fornia corporation, and citizen of the State of California, the above-named plaintiff, being aggrieved by the judgment and decree filed and entered herein on the 11th day of March, 1932, —,

DOES HEREBY APPEAL from said judgment and the whole thereof to the United States Ciruit Court of Appeals for the Ninth Circuit, for the reason and upon the grounds specified in the plaintiff's assignment of errors accompanying this petition, and does hereby pray that an order be made and entered herein allowing the said appeal; that a citation issue herein and a transcript of the record herein be sent to the said United States Circuit Court of Appeals for the Ninth Circuit; that said order fix the amount of bond to be given herein covering the costs and disbursements upon such appeal, and for a supersedeas bond, staying execution upon the judgment for costs and disbursements entered herein.

AND WHEREAS, at the time of the entry of the aforesaid judgment and decree, an order was duly made and entered herein that the preliminary injunction heretofore issued in the cause be continued in full force for a period of fifteen (15) days to permit the above-named plaintiff to perfect his appeal from said decree.

NOW, THEREFORE, the above-named plaintiff does further [69] pray that said preliminary injunction order be restored and continued in force during the pendency of such appeal, upon the plaintiff depositing its bond in such sum as the court may consider proper for the security of the rights

of these defendants if said restraining order shall be upon said appeal vacated.

And the appellant respectfully asks that such other and further order be made as shall be proper in the premises.

Respectfully submitted,

A. E. REAMES,

Attorney for the Plaintiff.

Upon consideration of the foregoing petition,—

IT IS HEREBY ORDERED AND DECREED that the plaintiff's said appeal from said judgment and decree, mentioned in said petition, be and the same is allowed upon the plaintiff's filing herein a good and sufficient undertaking in the sum of One Thousand Dollars ($1,000.00), covering the costs and disbursements upon appeal, and for a supersedeas bond staying execution upon the judgment for costs and disbursements entered in said decree, which bond shall be subject to the approval of the above-entitled court.

That upon the filing of said undertaking a citation issue upon such appeal and a transcript of the record of this cause be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit.

The matter of the application of the plaintiff for a continuance of the preliminary injunction is covered by a separate order made concurrently herewith and hereby referred to him and made a part hereof.

Dated this 23d day of March, 1932.

JAMES ALGER FEE,
United States District Judge.

Filed March 23, 1932. [70]

AND AFTERWARDS, to wit, on the 23d day of March, 1932, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

The plaintiff being now in the act of filing with the Clerk of this court his petition for an order allowing his appeal from the decree made and entered herein on the 11th of March, 1932, to the United States Circuit Court of Appeals for the Ninth Circuit, does hereby make the following assignments of error upon such appeal, to wit:

The Court erred in said Decree as follows:

I.

In dissolving the temporary injunction or restraining order heretofore issued herein.

II.

In decreeing that the plaintiff have no other relief herein except the permanent injunction made and entered in said decree restraining the acts therein enjoined.

III.

In adjudging and decreeing that the defendant shall have their costs and disbursements therein taxed at $———.

IV.

In failing to decree that ever since the 11th day of March, 1921, the plaintiff has been and now is the owner in fee simple, and entitled to the possession of Lots 1 and 2 in Section 15, Township 36 South of Range 3 West of Willamette Meridian, [71] in Jackson County, Oregon, and that said lands are situated along and border upon the banks of Rogue River, which is a non-navigable stream. That plaintiff's said ownership and right of possession extends under the waters of the said stream to the middle of the channel or thread of the current of said stream; that said ownership and right of possession includes the bed of said stream lying in front of said Lots 1 and 2 to the said thread of said stream; that said lands are riparian to such stream, and the plaintiff's said ownership and right of possession extends to and includes the riparian rights belonging to said lands so situated. That the plaintiff as such riparian owner is entitled to have said stream flow over and upon said lands in its natural channel and as it has been wont to do, undiminished in quantity and quality; that the western border of plaintiff's said lands is the thread of the said stream; that the plaintiff in the ownership of said land is entitled to have said thread of of said stream continued in its present location, and that said thread of said stream cannot be changed by the

acts of the defendants, or either of them, in the blasting or removing of rock from the natural channel of said stream.

V.

That the plaintiff has been, during all the times since the said 11th day of March, 1921, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen of that state. That it is a public service corporation having the powers of eminent domain, and is a public utility in Oregon, and as such has complied with the Oregon laws fixing the rates for the sale and distribution of electric current in Oregon; that as such public service corporation, the plaintiff needs and requires its said lands and the waters of said stream in connection with the manufacture of such electric current for such public purposes; that it is entitled to so use said waters upon its said lands as such public utility for such purposes; that the shattered rock in the [72] bed of said stream, and opposite said Lots 1 and 2 and west of the thread of said stream where the defendant Cement Company carried on its operations in the blasting of the rock bed of said river, mentioned in the complaint herein, and referred to in Paragraph XVIII of the further and separate answer of the defendants to the plaintiff's complaint herein, cannot be removed without the changing of the thread of said stream, which is the west boundary to plaintiff's said lands, nor without withdrawing from plaintiff's said lands said waters.

VI.

In not restraining and enjoining the defendants and each thereof from carrying on any further or other blasting of the bed of said stream in front of said Lots 1 and 2 and from removing from its natural place in said stream any portion of the shattered rock bed of said stream as the same now lies in place therein; or from doing any other act or thing that would change the thread of said stream or deprive the plaintiff and its successors in the ownership of its said lands from the natural flow, use and enjoyment of the waters of said stream for said public purposes.

VII.

In not enjoining the defendant Cement Company from constructing or maintaining any power plant on said river at its proposed site, as established in this case, whereby the waters of said stream could at low water be entirely withdrawn from plaintiff's said Lots 1 and/or 2. Said decree should have provided that it has been established herein that the defendant Cement Company intends to and will, unless restrained, so establish an electric plant at its said site, so that the flow of the waters of said stream can be regulated from the defendant Cement Company's cement plant and by which regulation all of the waters of said stream might be withdrawn from plaintiff's said lands, to [73] plaintiff's great and irreparable injury and damage, and all such acts should have been in said decree restrained and perpetually enjoined; that the injunction which should have been entered in said decree should have

been made to apply not only to the defendants and each thereof, but to their successors in interest in and to Lots 6, 7 and 8 of said Section 15.

VIII.

That said judgment and decree herein should have granted plaintiff a judgment against the defendants and each thereof for plaintiff's cost and disbursements herein taxed, and the restraining order heretofore, on the 26th day of July, 1930, should have been in said decree made a permanent injunction against each of the defendants, their successors in interest and assigns in the ownership of said Lots 6, 7 and 8 in said Section 15, and against all others in the aid or behalf of any of them.

Respectfully submitted,

A. E. REAMES,

Attorney for the Plaintiff.

Filed March 23, 1932. [74]

AND AFTERWARDS, to wit, on the 25th day of March, 1932, there was duly filed in said court a prayer for reversal, in words and figures as follows, to wit:

[Title of Court and Cause.]

PRAYER FOR REVERSAL.

Comes now the plaintiff, California Oregon Power Company, and prays that the decree heretofore on the 11th day of March, 1932, entered herein, be in

all things reversed; that the judgment for costs and disbursements herein taxed at $447.65 be reversed and that plaintiff have judgment for its costs and disbursements herein; that the temporary injunction order heretofore entered herein on July 26th, 1930, be continued in force and made final herein; that the plaintiff have a decree to the effect that ever since the 11th day of March, 1921, the plaintiff has been and now is the owner in fee simple and entitled to the possession of Lots 1 and 2 in Section 15, Township 36 South of Range 3 West of Willamette Meridian, in Jackson County, Oregon, and that said lands are situated along and border upon the banks of Rogue River, which is a non-navigable stream; that plaintiff's said ownership and right of possession extends under the waters of the said stream to the middle of the channel or thread of the current of said stream; that said ownership and right of possession includes the bed of said stream lying in front of said Lots 1 and 2 to the said thread of said stream; that said lands are riparian to such stream, and the plaintiff's said ownership and right of possession extends to and includes the riparian rights belonging to said lands so situated; that the plaintiff as such riparian owner is entitled to have said stream flow over and upon said lands in its natural channel and as it has been wont to do, undiminished [75] in quantity and quality; that the western border of plaintiff's said lands is the thread of the said stream; that the plaintiff in the ownership of said land is entitled to have said thread of said stream continued in

its present location, and that said thread of said stream cannot be changed by the acts of the defendants, or either of them, in the blasting or removing of rock from the natural channel of said stream; that the plaintiff has been, during all the times since the said 11th day of March, 1921, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen of that state; that it is a public service corporation having the powers of eminent domain, and is a public utility in Oregon, and as such has complied with the Oregon laws fixing the rates for the sale and distribution of electric current in Oregon; that as such public service corporation, the plaintiff needs and requires its said lands and the waters of said stream in connection with the manufacture of such electric current for such public purposes; that it is entitled to so use said waters upon its said lands as such public utility for such purposes; that the shattered rock in the bed of said stream, and opposite said Lots 1 and 2 and west of the thread of said stream where the defendant Cement Company carried on its operations in the blasting of the rock bed of said river, mentioned in the complaint herein, and referred to in Paragraph XVIII of the further and separate answer of the defendants to the plaintiff's complaint herein, cannot be removed without the changing of the thread of said stream, which is the west boundary to plaintiff's said lands, nor without withdrawing from plaintiff's said lands, said waters.

That a decree be entered herein restraining and enjoining the defendants and each thereof from carrying on any further or other blasting of the bed of said stream in front of said Lots 1 and 2 and from removing from its natural place in said stream any portion of the shattered rock bed of said [76] stream as the same now lies in place therein; or from doing any other act or thing that would change the thread of said stream or deprive the plaintiff and its successors in the ownership of its said lands from the natural flow, use and enjoyment of the waters of said stream for a public purpose herein; enjoining the defendant Cement Company and its successors from constructing or maintaining any power plant on said river at or near its proposed site which shall draw the water of said stream, at low water, entirely off of plaintiff's said Lots 1 and/or 2; that a decree be entered to the effect that the defendant Cement Company will, unless restrained, so establish its electric plant at said site in such manner that the flow of the water of said stream can be so regulated by it from its cement mill and by which regulation all of the water of the said stream may be withdrawn from plaintiff's said land at low water to plaintiff's great and irreparable injury and damage, and enjoining perpetually all of such acts; that a decree be entered herein in accordance with the prayer of the complaint and the assignment of errors heretofore filed herein on the 23d day of March, 1932, and that such

decree grant such other and further relief as shall be just and equitable in the premises.

A. E. REAMES,
Attorney for Plaintiff.

Filed March 25, 1932. [77]

AND AFTERWARDS, to wit, on Wednesday, the 23d day of March, 1932, the same being the 14th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, United States District Judge, presiding,—the following proceedings were had in said cause, to wit:

[Title of Court and Cause.]

ORDER CONTINUING INJUNCTION DURING APPEAL AND FIXING BOND.

Upon the application of the plaintiff for a continuance of the preliminary injunction herein during the pendency of the appeal of this cause to the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS ORDERED that the said restraining order which was originally issued July 26th, 1930, and which was continued in force by the order of March 11th, 1932, for a period of fifteen (15) days after said date, be and the same is restored and continued in full force and effect during the pendency of this appeal, and subject to the order of the said Circuit Court of Appeals, conditioned that the

plaintiff shall, while said preliminary injunction is still in full force and effect, under said order of March 11th, 1932, file herein a good and sufficient undertaking in the sum of $9,000, to be approved by the Court, to the effect that the plaintiff will pay to the above-named defendants all damages which they may sustain by reason of said injunction order being in force during the pendency of such appeal if the said injunction order shall be finally determined to been wrongful. The bond upon appeal and said injunction bond herein provided for may be combined in the one instrument in the total amount of the said appeal bond as fixed by this court, plus the amount of the injunction bond as herein fixed.

Dated this 23d day of March, 1932.

JAMES ALGER FEE,
United States District Judge.

Filed March 23, 1932. [78]

AND AFTERWARDS, to wit, on the —— day of March, 1932, there was duly filed in said court a cost, supersedeas and injunction bond, in words and figures as follows, to wit:

[Title of Court and Cause.]

COST, SUPERSEDEAS AND INJUNCTION BOND.

The plaintiff, having petitioned for and having been allowed an appeal from the decree entered

herein on the 11th day of March, 1932, and its bond for costs on appeal and for a supersedeas bond having been fixed in the sum of One Thousand ($1,000.00) Dollars, and having petitioned for an order continuing in force the preliminary injunction heretofore, on July 26th, 1930, entered, and the Court having made an order continuing in effect said preliminary injunction pending appeal and fixing the injunction bond therefore in the sum of Nine Thousand ($9,000.00) Dollars, and having ordered that said two bonds, in the aggregate sum of Ten Thousand ($10,000.00) Dollars, might be included in the one undertaking,—

NOW, THEREFORE, we, the California Oregon Power Company, as principal, by A. E. Reames, its attorney of record, and the United States Fidelity & Guaranty Company, a Maryland surety company, qualified in Oregon to write this bond, do hereby undertake that if the said The California Oregon Power Company shall fail to prosecute its said appeal to effect, that we will pay all damages and costs which the defendants, or either of them, shall sustain, not exceeding the sum of One Thousand ($1,000.00) Dollars; that if upon such appeal said injunction order shall be held to have been wrongful and without sufficient cause, we will pay to the defendants all damages which they may sustain during the pendency of said appeal, not exceeding the sum of Nine Thousand ($9,000.00) Dollars. [79] This bond is in a total sum of $10,000.00, covering all costs and disbursements on appeal; the judgment for costs heretofore rendered herein and the dam-

ages that may result from said injunction during the continuance thereof.

IN WITNESS WHEREOF The California Oregon Power Company has executed this instrument, by its attorney, and the United States Fidelity & Guaranty Company has executed this instrument by its attorney-in-fact, who has affixed its seal thereto this 23d day of March, 1932.

THE CALIFORNIA OREGON POWER COMPANY.

By A. E. REAMES,
Its Attorney.

[Seal, United States Fidelity & Guaranty Company]

UNITED STATES FIDELITY & GUARANTY COMPANY.

By G. CUNNINGHAM,
Its Attorney-in-fact.

Countersigned:

By G. CUNNINGHAM,
Resident Agent.

The foregoing undertaking is hereby approved. Dated March 23, 1932.

JAMES ALGER FEE,
District Judge.

Filed March 23, 1932. [80]

AND AFTERWARDS, to wit, on the 25th day of March, 1932, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [81]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To G. H. Marsh, Clerk of the Above-entitled Court:

Please include in the transcript on appeal herein the following:

1. Bill of complaint and restraining order (Preliminary injunction dated July 26, 1930).
2. Stipulation extending the time within which defendants may answer and that the hearing upon plaintiff's application for an injunction fixed in said injunction order for the 30th day of July, 1930, shall be postponed until a date in September to be determined as provided in the stipulation, and continuing the injunction in full force and effect until that hearing, filed September 18th, 1930.
3. Order deferring decision on application to dissolve injunction, filed September 19th, 1930.
4. Answer of defendants.
5. Replication.
6. Transcript of testimony as approved by the court.
7. Opinion of the court filed March 11th, 1932.
8. Findings of fact and conclusions of law filed March 11th, 1932.
9. Final decree entered March 11th, 1932.
10. Order continuing preliminary injunction for 15 days to permit plaintiff to perfect appeal from decree, entered March 11th, 1932.

11. Petition for order allowing appeal, with order allowing appeal and fixing bond on appeal, filed March 23, 1932. [82]
12. Assignment of errors, filed March 23, 1932.
13. Prayer for reversal.
14. Order continuing the temporary injunction pending appeal to the United States Circuit Court of Appeals for the Ninth Circuit and fixing bond therefor; entered March 23d, 1932.
15. Citation on appeal with proof and admission of service, filed March 23d, 1932.
16. Bond on appeal and approval thereof.
17. Bond on injunction and approval thereof.
18. Stipulation relative to statement of evidence.
19. Order directing printing of certain exhibits and/or forwarding of the other exhibits.

A. E. REAMES,
Attorney for the Plaintiff.

Due and legal service of the within is hereby acknowledged this twenty-fifth day of March, 1932.

JOHN K. KOLLOCK,
Attorney for Defendants.

Filed March 25, 1932. [83]

AND AFTERWARDS, to wit, on the 17th day of May, 1932, there was duly filed in said court a statement of the evidence, in words and figures as follows, to wit: [84]

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1—Containing two maps filed since former trial.
Identified 3

2—Map showing thread of stream and blasted area in yellow.
Identified 19
Received 21

3—Record at hearing before Judge Bean.
Identified 12
Received 12

4—Photo of area before blasting.
Identified 13
Received 13

5—Photo of area after blasting.
Identified 14–5
Received 15

6—Drawings, 7 sheets (Plffs. Ex. 10 in former trial).
Identified 16
Received 18

7—Same as Defendants' Exhibit "B."

8—Photo of blasted area—close-up.
Identified.
Received 21

9—Map showing effect of complete diversion.
Identified 22
Received 23

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EXHIBITS—Continued:

10—Map showing effect of partial diversion.
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11—Cross-section on A–A, upper reef and across river.
Identified 24
Received 26

12—Cross-section showing blasted area and effect of removing the same.
Identified 26
Received 26–7

13—Copy of blue-print showing shattered area and portion of reef at C–C—part of maps just filed before trial.
Identified 28
Received 92

14—Public Service Commission Rules, Regulations, etc.
Identified 39
Received 39

15—Decree of May 3, 1911, Judge Bean. (Plffs. Ex. 7 in first trial).
Identified 40
Received 40

16—Decree of May 20, 1929, Judge Bean after mandate of C. C. A.
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17—Judgment-roll in old case E.-8891.
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18—Circular letter to voters of City of Gold Hill. (Tr. 111.)
Identified 44–45
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19—Field-notes of Allen.
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20—Map, blue-print, which shows flow of river through channels and openings.
Identified 136
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20½—Proof of claim #30 in Rogue R. Adjudication.
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21—Photo by Olsen, bridge, soundings, etc.
Identified 167
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22—Tracing or profile, showing soundings, bottom of river.
Identified 168
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23—Plat showing profile of reef as survey showed.
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24—Field-notes (withdrawn by agreement, see page 182).
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25—Photo by Olsen, illustrating method of measuring bedrock elevations at reef.
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26—Photo—same purpose as 25.
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27—Stream flow records.
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28—Certified township plat of T. 36 S. R. 3 W. of W. M.
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29—Certified copy of judgment-roll in original Condemnation case.
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30—Schedule of dates showing when the various suits were started by the parties over the property.
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	Identified	74
C	Photograph showing concrete work	
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D	Photograph of River looking south toward entrance of canal	
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E	Map	
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F	Cross-section from point on center group of islands	
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G	Photograph, panoramic view from west bank prior to blasting	
	Identified	90
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H	Aerial Mosaic resultant of several photos	
	Identified	93–4
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J Sectional aerial photo showing increased flow in West channel from opening in diversion dam
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K Copy of Rating of effective head at different stages of river
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L Graph resultant of power that can be delivered all losses considered
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M Plat of discharge by months of the river, 1906 to 1925
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N Certified copy of permit No. 3275 and 7942
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O Decree of Adjudication, Rogue River
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P Amended plan of diversion filed Apr. 8, 1931
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R. Deed from McClure to City of Gold Hill
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S Deed from Oregon Water & Power to Rogue River Public Service Corpn.
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T Deed Maguire, Master in Chancery to Rountree
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U Deed Rountree to Irrigation & Power Co.
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V Deed Irrigation and Power Co. to City of Gold Hill
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W Patent, United States to Fredenburg
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EE Judgment-roll in case No. 3098, decree of May 11, 1911
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[Title of Court and Cause.]

CONDENSED STATEMENT OF THE EVIDENCE SUBMITTED FOR THE COURT'S APPROVAL.

BE IT REMEMBERED, this cause came on for trial before the Honorable James Alger Fee, Judge of the above-entitled court, on Thursday, the 23d day of April, 1931, at the hour of 9:30 A. M., plaintiff being represented by Mr. A. E. Reames and the defendant by Messrs. John K. Kollock and Gus Newbury.

WHEREUPON, the evidence in the cause was taken, which, upon being reduced to narrative form, is in substance as follows, to wit: [90—1]

TESTIMONY OF W. H. MUIRHEAD, FOR PLAINTIFF.

W. H. MUIRHEAD was called by the plaintiff as a witness and testified in substance as follows:

Examination by A. E. REAMES, Attorney for the Plaintiff.

He stated that he was Vice-president and Treasurer of Beaver-Portland Cement Company, defendant herein, hereinafter in this narrative statement of the evidence referred to as "defendant Cement Company."

He testified that he was a witness at the former trial of this case before His Honor Judge Bean; that at that trial said defendant's engineer, Allen, defined the area of the river bottom that had been shattered by the explosion of dynamite alleged in the complaint. He stated that Allen attempted to describe the area so blasted, but that it was irregular and difficult to describe. Asked if defendant Cement Company intended to do more blasting he answered (Tr., page 2), possibly, that the holes are irregularly shaped, and it may be necessary to remove rock where it is found the channel is irregular, and to square it up; that the company intended to do work below; would do such work farther down the stream as was necessary to complete the project, but at the point of the prior blasting as described by Allen, it was the intention to blast out enough to pass the amount of water that

(Testimony of W. H. Muirhead.)

will be required to pass through when the company put the concrete structure at the point which it would later designate. That it would block off the flow from the east [91—2] to the west side of the river; that this was the intention in blasting the area.

Reminded that he had not answered the question, and asked again to answer it he stated that "we" expect to square it up and we farther may have to do some blasting when we put our concrete work in; may have to do some drilling when we put it in; may do some blasting to remove loose rock to get over and build a crib; that we did not get sufficient out of what we did blast.

At plaintiff's request defendants' counsel produced maps that had been filed with the State Engineer since the former trial of this cause before His Honor Judge Bean (October 14, 1930), and they were marked

"PLAINTIFF'S EXHIBIT 1 FOR IDENTIFICATION."

(Containing 2 maps. Tr. 5.)

Counsel for plaintiff called attention of the witness to the first map in Exhibit 1, which contained the legend:

"This area to be excavated 6 feet below low water or to elevation of 1063.5 plus or minus."

His attention was directed to the arrow pointing to certain rocks and to the heavy line on the map and also to the two light lines. He was then asked to point out what operation the company intended

(Testimony of W. H. Muirhead.)

to indicate by said legend as to the portion of the area to be removed; whether it was all of the portion embraced within the heavy lines or [92—3] were embraced in the light lines. He answered:

In the heavy lines; that the light lines represented the boundaries of the reef and islands as they existed prior to the shot, and the solid light lines represented the area that is now in a shattered state, and it is difficult to say whether it is in the original channel or solid rock but that now it is apparently solid because of the "cast up" from the blast.

Asked how wide the excavation will be, he answered:

"It is our intention to shoot a stretch through there approximately thirty feet wide and five deep below the water stage at the date of our engineer's estimate, the original estimate which was 1069.40." That his engineer could testify more accurately, but that it was approximately an area thirty feet wide and five feet deep and as long as was necessary to go through there which was approximately 280 feet; that there was a diagonal stretch that they also blasted out which, of course, should take the measure at the maximum width, which would be more than thirty feet; that the area was originally the channel which was passing thirty or forty or more second-feet of water; that we blasted simply to utilize such natural passage that was there to save power.

He testified that the 1063.5 on the exhibit is a

(Testimony of W. H. Muirhead.)

foot lower elevation than they intended to go when they put in the blast. The Court asked if he meant that he was going down a foot lower than was intended at the time of the former trial, being the one referred to above. Witness answered that our holes were down five feet below that level, and the engineer to get this six feet (the engineer having intended to have an area six feet below), the company in shooting made [93—4] the mistake of only getting five feet.

Asked by counsel if the holes were not drilled eight feet deep, he answered five feet; that the holes were of varying depth; they may have gone from two feet; some were drilled with three feet of water over the top of the holes; that this would be only two feet; other holes were drilled in the reef above the surface of the water several feet; these holes may have been nine feet deep in solid rock, but all went to the same level, five feet below the water stage 1069.00. (Counsel agree that the witness intended the "1069.00" to mean surface water elevation.)

At the request of the Court he marked the blasted area to be removed, saying:

A. I shall mark the area of blasted rock that is to be removed "A," this area being that enclosed by the solid lines at this point." (Tr. 8.)

Asked by his counsel if he referred to the dotted lines, he answered: "That is the same area but the dotted lines indicate the line of the shore and the rock reef, before the blast."

The witness stated that the area excavated should

(Testimony of W. H. Muirhead.)

be that which the company's engineer Allen had, at the said former trial, described by metes and bounds, but that the witness could not say accurately whether it was or not exactly the same that it may be that the area which the engineer has shown in the solid line would go beyond the points that have been shot; that the engineer shows the rock to be removed and some of that rock was cast over from the blast; that the company blasted a channel thirty feet wide and some of the [94—5] rock might have been thrown fifty feet, but that was not blasted area, but the company would gather rock along an area more than thirty feet wide and maybe that is what may be shown on the map.

TYPE OF PLANT TO BE CONSTRUCTED.

He testified that his company intended to build a hydro-electric plant for the manufacture of electric power by the use of turbines and generator with the use of the flow of the water, and a given head and volume; that the turbines will be equipped with gates that will be automatically operated according to the amount of power used at the cement mill; that when the electrical load is taken at the cement mill the amount of water required to make that quantity of electricity will automatically be let into these turbines or wheels and only that amount of water; that it will operate in that way except that there is a maximum which the company can take because if the company drew more than a certain amount of water it would drop its head and lose efficiency. That there was a certain point

(Testimony of W. H. Muirhead.)

beyond which his company could not open the gates and still operate the plant; that it is a type of plant that when not in operation it has no water passing through the wheels; that is,—when no electrical load is being drawn at the cement mill there would be no water passing through the turbines; the gates on the turbines would then be shut; the water would be coming down the canal but would be going over the spillway adjacent to the power plant. The company has one gate at the entrance of the canal, and there is another about one hundred fifty feet from the present generating plant; that it is there for [95—6] protection against floods, etc.

He testified that it is the intention of defendant Cement Company to deepen and widen the existing canal sufficient to pass the amount of water that it will be able to get with its diversion in the river as contemplated in this case.

Asked to state how much water this would be in second-feet, he replied it will be large enough to take all of the water that we have under permits and application, 1347 second-feet; not that the company expected to get that much all of the time, but to have it so that they can use it when it is available.

Asked if the plant was to be constructed so as to draw in and utilize 1347 second-feet, he answered: "Yes." (Tr. 11.)

Witness' attention was called by plaintiff's counsel to Paragraph XI at page 9 of said answer, where the amount of water which defendants claim

(Testimony of W. H. Muirhead.)

was stated 1397 second-feet. It was asked by plaintiff's counsel if there was a mistake in considering the amount of water 1347 second-feet. Witness answered that he was anxious to see that matter straightened out too, but that he believed it to be 1347 second-feet "usable at our diversion."

Asked if he wanted to see the allegation of the answer, witness stated "Can't our permits speak as to this?" His attention was so called to the paragraph and to the statement there that as to the right for 147 second-feet, 25 second-feet was deductible as having been sold to the Gold Hill Irrigation District, leaving 122 second-feet in the 147 second-foot appropriation. He was asked what he said about that. Defendants' counsel stated that he did not know as he wanted [96—7] to figure it out; that there may be an error; that the permits are actually there and they will state in full. Defendant's counsel stated that they always talked 1347 net, and it may be that they had a little more than they thought they had.

Asked by plaintiff's counsel what amount of power the cement comany required at its cement mill, he stated:

Approximately 1500 horse-power at the plant and about 425 additional at the quarry that seventy-five per cent of the amount of horse-power would practically indicate the amount embraced in kilowatts.

Asked as to the amount of power the cement company was required to supply to the City of Gold Hill at one cent per killowatt hour, he stated:

(Testimony of W. H. Muirhead.)

That it was supposed to give 20 kilowatts free and obligated to give any additional they want over that amount without limitation up to the company's capacity of one cent per kilowatt hour.

Asked whether he had answered the question as to how much his company intended to widen and lower its canal, he stated that he thought that he had said that it would increase its dimension to a size that would permit the taking of the entire amount of water that the cement company would be permitted to take by its permits and applications. (Counsel agree that the witness here refers to the permits; that the permits are now in the name of defendant City and covered by the contract between the defendants, copy of which is attached to the answer.)

Asked how much water he contemplated would be left on plaintiff's Lots 1 and 2 when the cement company's [97—8] plant should be in operation, he stated that he believed that at the very minimum there would be 122 second-feet flowing down the east side of the river on said lots, and witness then added: "And which we will have to permit to flow there as a fishway. I believe there is a law passed that requires that." (Tr. 14.)

Plaintiff's counsel having stated that he knew of no law requiring a fishway on plaintiff's land the witness answered:

"Well it has to be down the river at least, and of course it couldn't get down to the canal through our turbines, so we will leave that originally."" (Tr. 14.)

TESTIMONY TAKEN BEFORE JUDGE BEAN INTRODUCED.

The plaintiff's attorney then offered from the transcript taken before Judge Bean certain portions in which defendant cement company's engineer Allen had attempted to point out upon the map the territory that the defendant cement company would blast and remove the blasted rock from in order to carry out its plant.

A colloquy occurred in this court between counsel as to the introduction of that testimony, whereupon the [98—9] following proceedings were had and the testimony there shown was so introduced from the transcript of the evidence taken before Judge Bean, to wit:

"Mr. REAMES.—I desire now at this time, to offer in evidence, that part of the transcript of the former trial, beginning with the word 'Court,' on page 119, down to and including the word 'water level.'

(Reads): "'Court: I am not asking how large needed, but just asking if there is anything in the record, in the pleadings or evidence, by which the Court, if it decides in favor of the defendant in this case, can say just what blasting you should do there, so when you start in to do the blasting there wouldn't be another lawsuit whether a channel beginning at a certain point, running in a certain direction a certain number of feet, a certain width and a certain depth. A. I can describe that very

well. COURT: How would a surveyor find that point? Suppose an impartial surveyor were called upon to locate that, not familiar with the work at all, but understood surveying. Mr. ALLEN: Beginning at a point south 420 feet from the quarter corner between Sections 10 and 15, Township 36 South, Range 3 East W. M., thence west 10 feet to the point of beginning. COURT: You have the point of beginning. Mr. ALLEN: Thence west 10 feet, thence south 20 degrees west 220 feet; thence northwesterly along the westerly bank of the river a distance of 45 feet, thence north 20 degrees east, 160 feet to the northwest corner of the first island from the westerly shore of the river. COURT: How wide? Mr. ALLEN: Being a width of 30 feet in width. COURT: What depth? Mr. ALLEN: And a depth of 6 feet below low water.' COURT: What? Mr. ALLEN: Six feet below low water. COURT: How much is that below,— A. (Mr. Muirhead): That would be an elevation of 63. COURT: How much is that below the ordinary depth of the water? Mr. ALLEN: That is 12 feet in here. COURT: You said something about five feet. Mr. ALLEN: Holes were drilled five feet, so you have to take down six feet in order to get that area. Thence north seven degrees west, thirty feet to the point of beginning. By taking a line thirty feet in width and approximately 220 feet in length, and to be excavated to a depth of six feet below the water level.'" [99—10]

There was also offered in evidence from that transcript at that time the following from the testi-

mony of Allen, as begins on page 106 of the Judge Bean Transcript:

"Mr. REAMES.—I desire to offer in evidence also from this testimony the following: It is just question and answer from page 106 of the testimony of the witness Allen: 'How much more water would draw through there when you lower your canal than if you had not excavated this blasted out area? A. Well, would draw between—in other words, this whole thing is contemplated to draw the 1347 second-feet through it, at a stage of the river which will permit it.' And also the testimony of the witness Allen from pages 108 and 109: 'Q. How many second-feet of water do you require for operation? A. In the ultimate development of the 2000 kilowatts we require the entire 1347 second-feet; on the thousand we require 675 second-feet; thirteen hundred is 930 second-feet. COURT.—What is the capacity of your proposed development? A. It is proposed—the first development will be a thousand kilowatts plus the present three hundred. COURT.—I asked how much it was. I don't care how you arrived at your conclusion. I would like to know the amount. A. The first development [100—11] would be 1300 kilowatts. Q. Approximately how much horse-power? A. That would be seventeen hundred horse-power. COURT.—Is that the proposed capacity of the development as now planned? A. As now planned, yes. COURT.—Thirteen hun*d*ed? A. Wait a second; we planned for the full two thousand kilowatts. COURT.—You said you proposed to lower your canal; four

(Testimony of W. H. Muirhead.)

feet; or four and a half, whatever it was: now how much did you estimate that that would provide? A. It would provide 2,000 kilowatts delivered at the cement works. COURT.—That is the limit of your proposed development? A. Yes, that is the limit of our proposed development. COURT.—How many second-feet of water would you require for that? A. 1347 second-feet. In other words, we would not be able to develop that full amount of— COURT.—I am just asking what you propose to do." (Tr. 25.)

The record at the Judge Bean hearing was introduced as

PLAINTIFF'S EXHIBIT 3. (Tr. 26.) [101—12]

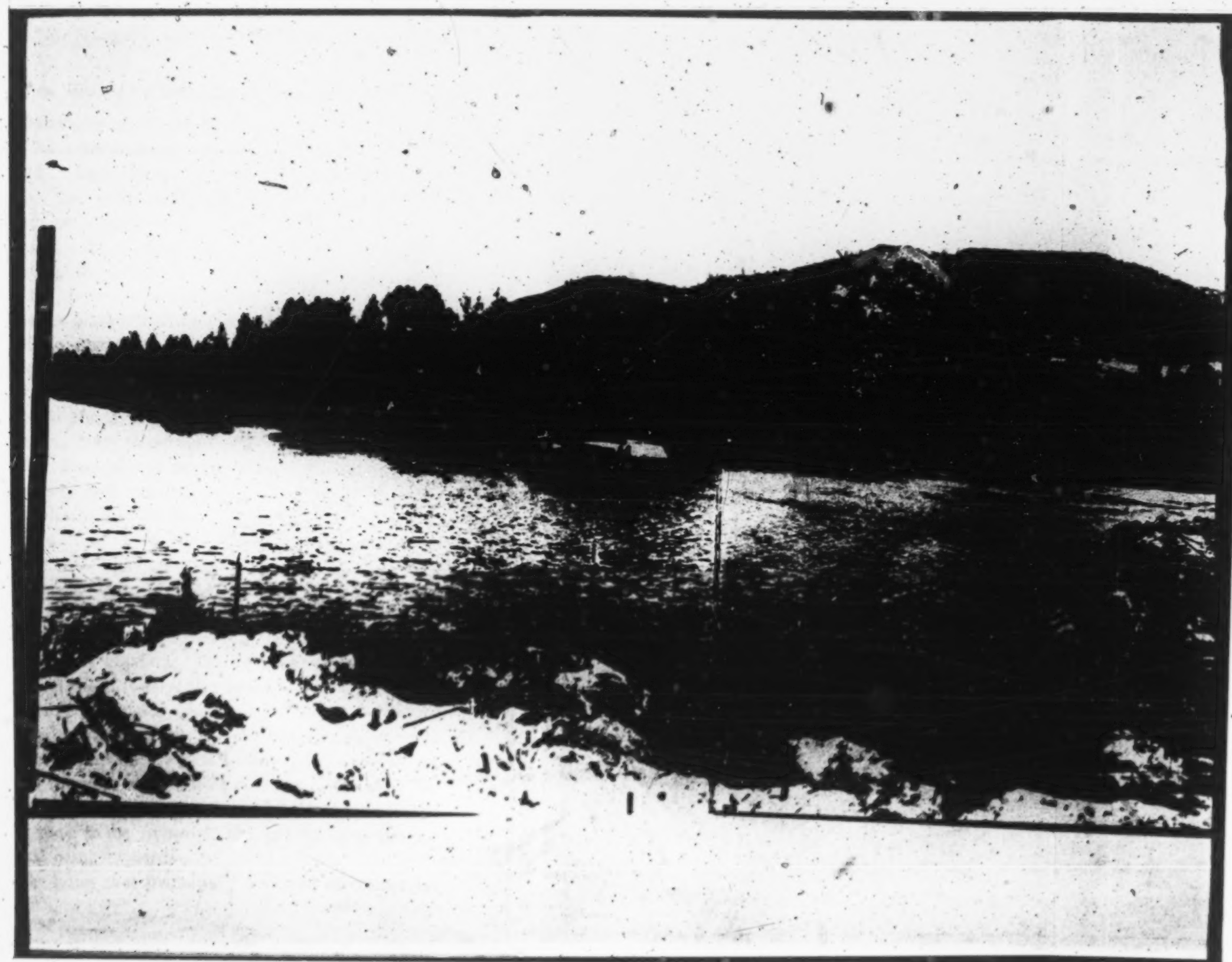
PHOTOGRAPHS SHOWING BLASTED AREA BEFORE AND AFTER BLASTING.

At this point plaintiff identified said two photographs, Exhibits 4 and 5 for Identification. (Tr. 26.)

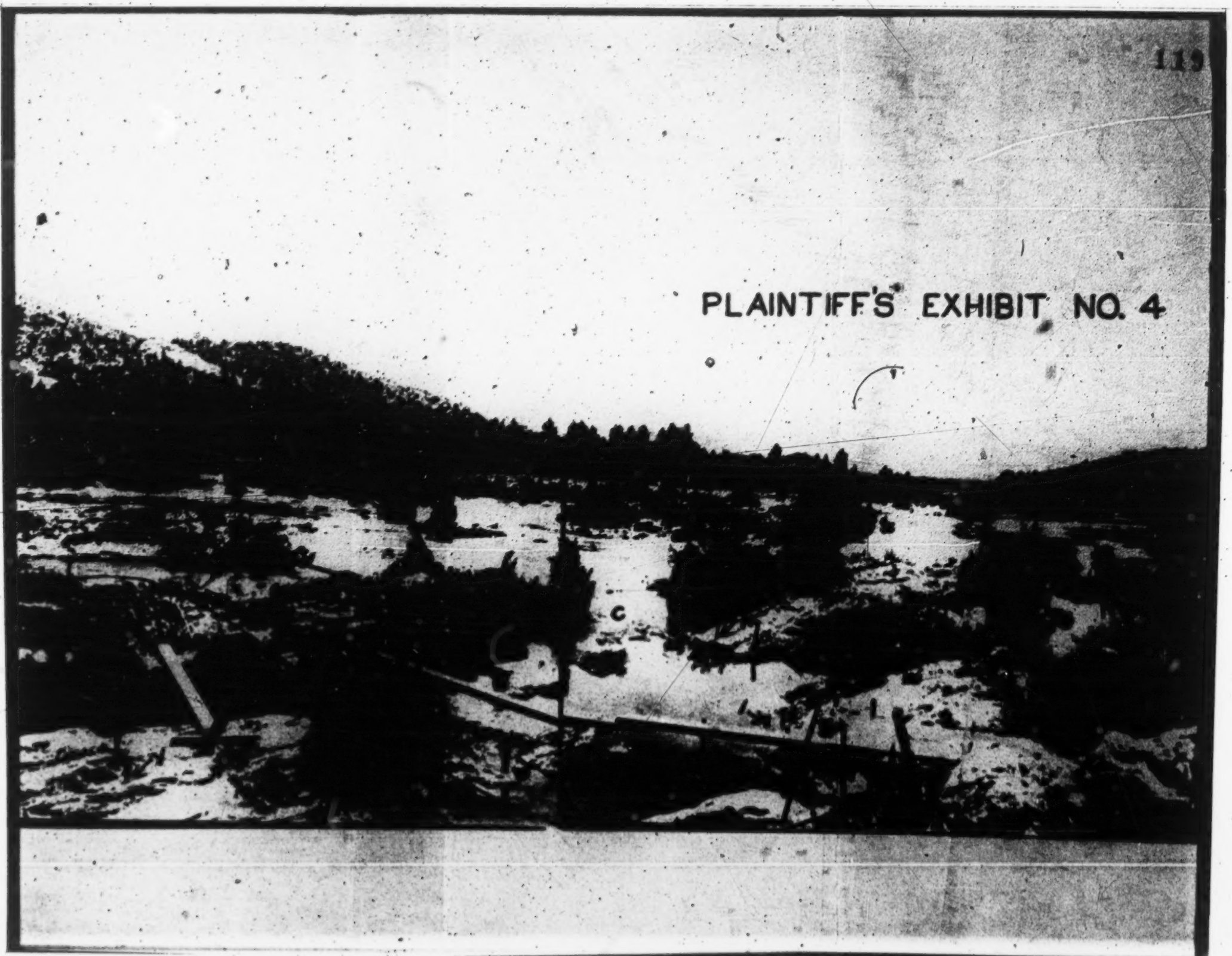
Mr. Muirhead testified that Exhibit 4 was taken a couple of days before the blasting occurred that it shows 220 holes from which wooden pegs protrude, these being the holes drilled to receive the dynamite. The witness pointed out the pegs in the picture showing the location of the holes.

The exhibit was received as

PLAINTIFF'S EXHIBIT 4. (Tr. 27.)



PLAINTIFF'S EXHIBIT NO. 4



(Testimony of W. H. Muirhead.)

The witness stated that the pegs marked "1" on Exhibit 4 are the type of pegs that were driven into holes that were drilled into the rock that some of them are deeper in the holes but they can be seen; that the holes were drilled with fairly uniform spacing throughout the area; that the entire area to be blasted was drilled at regular intervals, so that the blast would clean it out as clean as possible, and leave no more ridges or crevices than could be helped; that some of the holes were drilled in the water between the ledges of rock; that in proportion to the area involved there [102—13] were as many holes in between as there are shown on the rock. That is—as many under the water as on the rock; that they are shown in such places as he then designated on the exhibit by an arrow pointing to them with the number "1" in the area. Some holes were as much as three feet under the water and hence do not show in the photograph. That at first they had intended to excavate so as to get a greater capacity than they were getting by the present blasting. But now being only allowed to go to the thread of the stream, there was not the necessity for having such a large area as previously existed and since the holes were already drilled, the company only shot the one that it needed to make the area required, being those adjacent to the channels, because it would take less powder and make less rock to be removed, the powder and the removal being expensive.

The holes shot principally followed the channels;

that there is a natural channel there seven or eight feet deep at the point which the witness marked "A" but at the Court's suggestion changed to "B," and also marked another point as "C"; stated shots followed the channel and marked another "D"; that they endeavored to follow the channels with the blasting so as to keep the rock that would have to be hauled away to a minimum, using the natural channel. Some of the blasted holes were on the west bank, some were east of the west bank; that it was all solid rock with the exception of a few indentations; that it is solid bedrock.

Shown Plaintiff's Exhibit 5 for Identification (photograph) he stated that it was taken three days after [103—14] the explosion and was to show the same area covered by Exhibit 4; that the angle from which the picture was taken was slightly different.

EXHIBIT 5 WAS HERE INTRODUCED. (Tr. 30.)

PLAINTIFF'S EXHIBIT NO. 5

(Testimony of W. H. Muirhead.)

The witness stated that the two photographs, Exhibits 4 and 5, represent the condition before and the condition following the blasting. (Tr. 30.) That the date of the taking of the picture is on each exhibit, Exhibit 4, July 13, 1930, Exhibit 5, July 24, 1930, and that the explosion occurred on the 21st of July.

CONTRACT BETWEEN DEFENDANTS.

Witness testified that the copy of the contract dated in October, 1926, and set up in defendants' answer is the contract between the defendants and was in force at the time witness was testifying; that there had been no extension of it but one would soon be necessary; that the company had paid the city upon it *a* $100.00 a month, amounting to $5,600.00. [104—15]

PLAINTIFF'S EXHIBIT 6 FOR IDENTIFICATION.

The witness was shown what in the first trial of this case, above referred to, had been Plaintiff's Exhibit 10, which was here marked 6 for identification. (Tr. 32.)

The witness testified that the exhibit contained seven sheets which are numbered up to a total of nine; that there is number two, two A, and number three, and then the numbering continued 4, 5, 6, etc.;

(Testimony of W. H. Muirhead.)

that on number three the spillways which he had referred to at the canal were shown but not designated as spillways. He testified that there were three and they were all shown on sheet number three; that on the top of the page appears "intake gates and the present canal." At the left upper corner on the upper part of the map it shows "overflow control gates"; just about the center of the page at the top of the page. That the spillway is shown to have an elevation of 1069.75 with a notation that they are to be raised to 1,073.75. These are water surface elevations. That is, that the water would have to exceed that surface elevation before it would fall over the spillway.

The witness made the following designations:

The entrances to the canal by the letter "E," the control gate at the entrance to the canal "D," the overflow control gates "F" and the spillway adjacent to the flume going into the power-house "G"; that the overflow elevation of "G" is not shown but it would have to be less than that of "F" because of the fall required in the canal; that a water surface elevation of 1068.87 at the [105—16] headgates would be 1067.75 at the power-house. This is indicated on the exhibit but that Engineer Allen could testify more accurately. He testified that the water from their diversion passes through the canal instead of the through the river channel. The witness

(Testimony of J. C. Thompson.)

was referring to Plaintiff's Exhibit 6 for Identification.

Mr. Muirhead was asked to look at the page that had been marked "3" in blue pencil at the left-hand top of the page, and state whether that correctly shows the present blasting or whether there had been any changes, and also whether there had been any difference in the profile readings at the foot of that page, it being called the so-called page 3 of the exhibit, but the Court interrupted to say it was page 2 and the witness answered that there were two pages "3," so that counsel removed from the exhibit, or scratched off, the figure "3."

The Court said to take off the "3" and mark it "Page 2," which was accordingly done. The witness was then asked with reference to this page 2, whether there had been any engineering done to show any different findings with reference to the elevations than those shown in the heavy line at the foot of the profile on that page. The witness answered not to his knowledge except that that is a plan of the original construction not now being utilized; that this profile is a profile of the bed of the river but that they are not now following the lines of that profile.

The witness testified that the heavy line there shown indicates the height of the rock at the bottom of the river as found by actual survey and at the

(Testimony of W. H. Muirhead.)

place where the first sheet shows the same; that this is a cross-section of the river at the point indicated by the long blue solid line on sheet 1 of this series of maps. (Tr. 36.) [106—17]

The Court admitted in evidence pages 2 and 3 of Plaintiff's Exhibit 6 for Identification, stating that the pages were so marked 2 and 3 at the lower right-hand corner; they were admitted for the purpose of illustrating the testimony theretofore introduced. (Tr. 40.)

Mr. Muirhead stated that the average head for pressure at their proposed electric plant would be 21 feet.

Asked at what surface water elevation that would be at the gates at the entrance of the canal he stated that he was not personally versed in the matter, but the information was shown on the exhibit at several different stages of the river; that the exhibit shows the effective head at three different stages of the river (Tr. 41), but that he was not a hydro-electrical engineer and would prefer not to testify and discuss it.

TESTIMONY OF HARRY OLSEN, FOR PLAINTIFF.

HARRY OLSEN, a witness for the plaintiff, testified on direct examination by Mr. REAMES: (Tr. 43.)

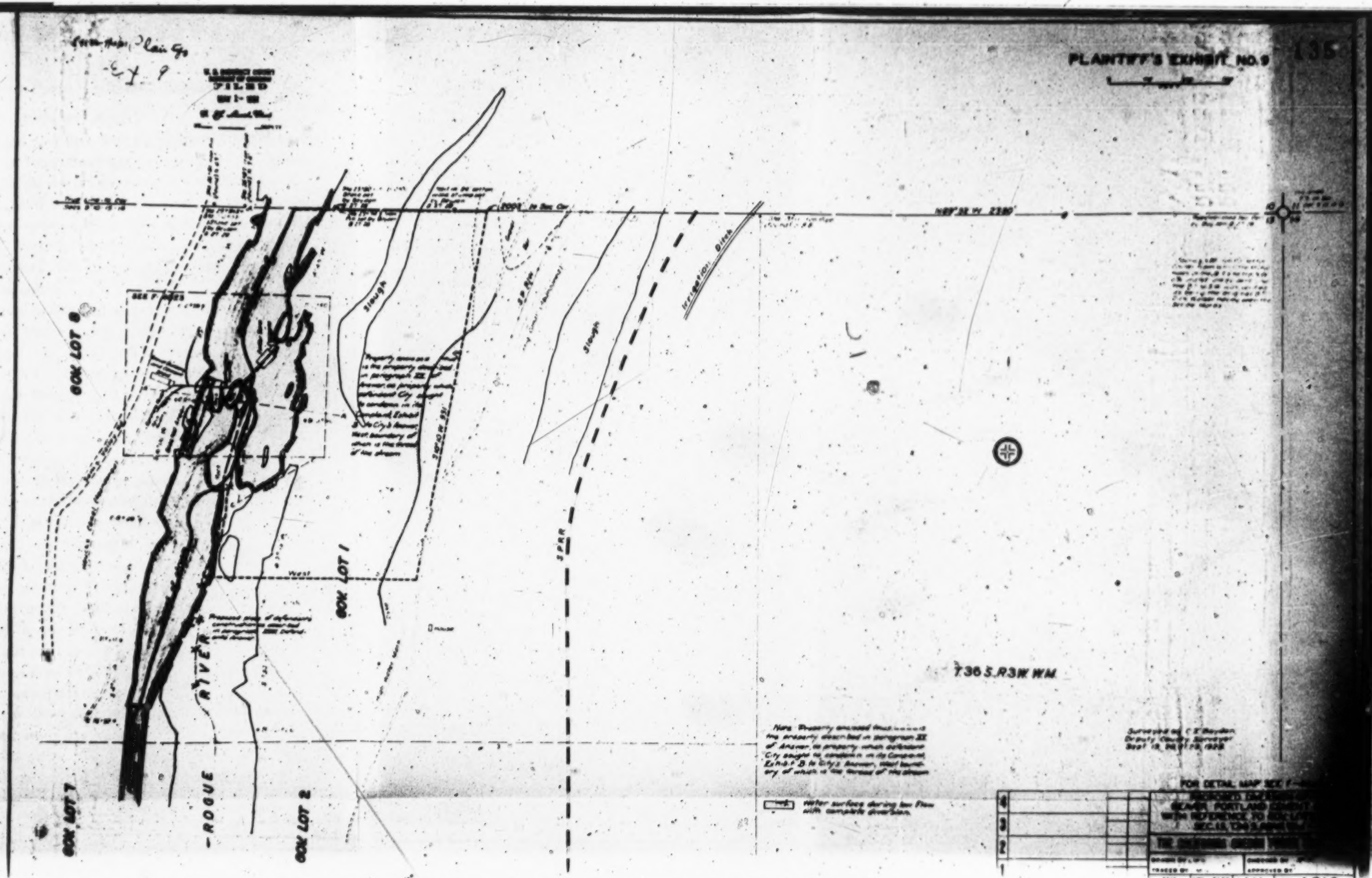
That he was 39 years old; resided at Medford, Oregon; was a civil hydraulic engineer for plaintiff;

(Testimony of Harry Olsen.)

a graduate of Stanford University in civil engineering with 15 years of experience. His qualifications were then admitted as an engineer. [107—18]

He said that he came into the employ of the company in 1923. He identified Plaintiff's Exhibit 2, a map prepared under his direction of the property in controversy, showing the thread of Rogue River located by measurements of the stream taken from within the banks of the stream; that the shore line as shown on the exhibit was obtained from field surveys platted during September, 1928, and the thread of the stream was located with respect to its banks at that time; that the area in the dotted line on Lot 1 on the exhibit indicates an area that defendant City of Gold Hill had sought to condemn in a suit between the parties to this suit in 1926; that the red line running down through the stream as shown upon the exhibit indicates the thread.

On examination by defendants' counsel, Mr. Kollock, he stated that the property inclosed in the dotted line was taken from the pleadings of the City of Gold Hill in that case; that since that he compared that description with the description in the city's complaint in the condemnation case and found it correct. The yellow area on the exhibit he stated indicates the blasted area as taken from the testimony of Mr. Allen, defendant Cement Company's engineer, as given in the former trial of this case before His Honor Judge Bean. He stated that in the description thus given by Allen there was ap-


PLAINTIFF'S EXHIBIT NO. 9
135
Slough
Slough
Irrigation Ditch
SPRR
GOK LOT 8
GOK LOT 1
GOK LOT 2
GOK LOT 7
ROGUE RIVER
West
T36S R3W WM
Water surface during low flow with complete diversion.
FOR DETAIL MAP SEE
E-4810

(Testimony of Harry Olsen.)

The witness testified that he prepared Plaintiff's Exhibit 9 for Identification to show the effect on the thread of the stream if the diversion thereof should be complete, and that this was Plaintiff's Exhibit 9; that it is the same as Plaintiff's Exhibit 2, with this difference: That the water surface as shown on Exhibit 9 is during low flow with the complete diversion into the canal.

The witness testified that assuming that the canal is so lowered and widened (according to former testimony), and the [111—22] diversion complete, that Exhibit 9 for Identification correctly shows the thread of the stream as it would then be; that Exhibit 9 shows the then condition of the south portion of plaintiff's Lot 1 and the condition of plaintiff's Lot 2 with reference to the river under such conditions. It shows no water passing over the reef, C–C, and shows the thread of the stream moved over all the way from 60 to possibly 150 feet; 60 feet on the upper end and 150 on the lower end.

He testified that he understood the operation of the electric plant to be installed as described by witness Muirhead; that the operation of such a plant would be governed by the power requirements at the cement mill, and that as these power requirements increased more water would be required; that as they decreased less water would be required, with the resultant effect that at times there would be no water going over the reef designated on the line C–C, but at other times there might be a slight amount of flow over on the east side of the river.

(Testimony of Harry Olsen.)

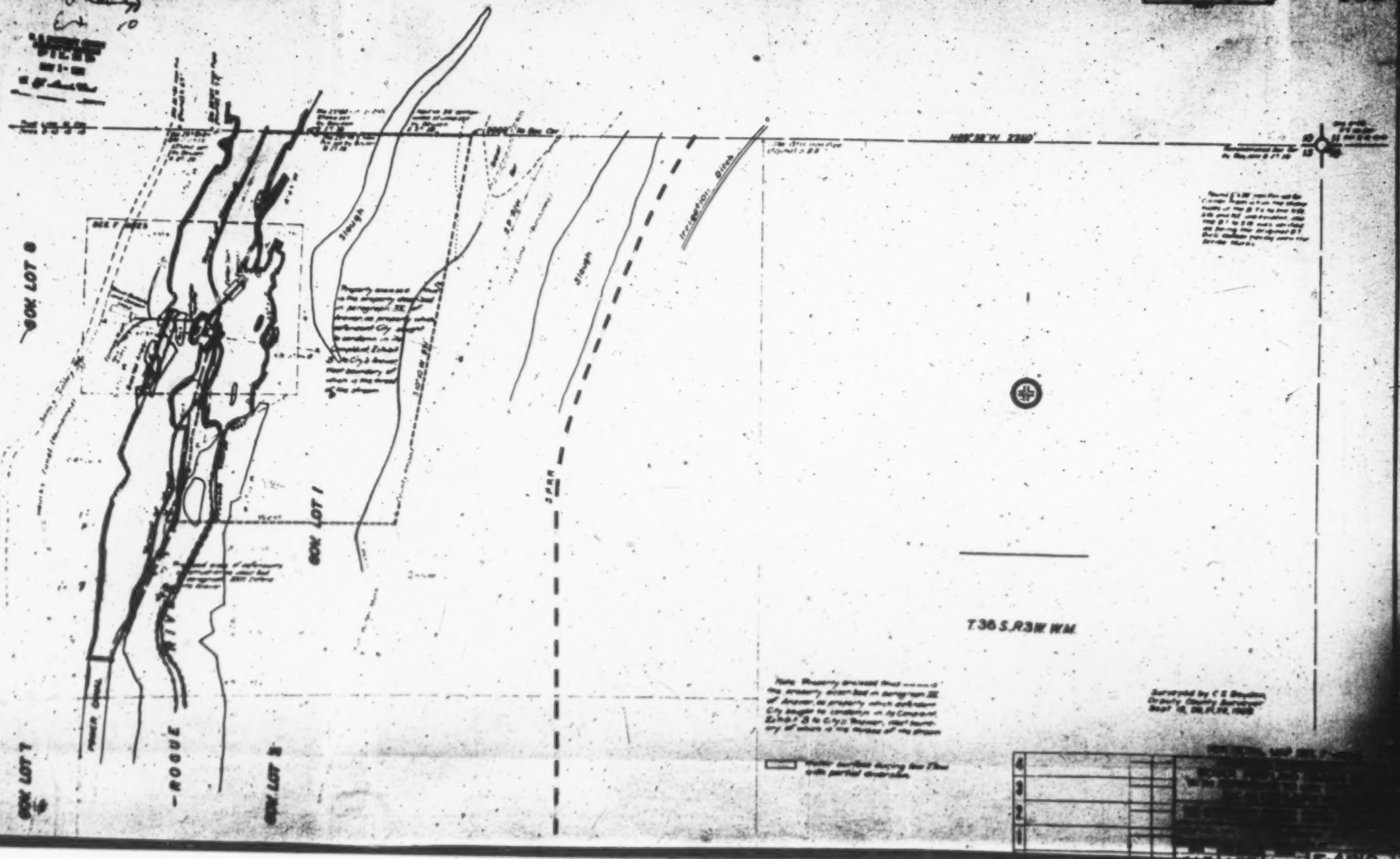
But this particular map (Plaintiff's Exhibit 9 for Identification) shows the conditions under the circumstances when all of the water would be diverted and no water would be flowing on the east side of the river.

Plaintiff's Exhibit 9 for Identification was then received as Plaintiff's Exhibit 9. (Tr. 52.)

PLAINTIFF'S EXHIBIT 10 FOR IDENTIFICATION.

Case #1616
Plaintiff
Exh. 10

PLAINTIFF'S EXHIBIT NO. 135



(Testimony of Harry Olsen.)

The witness then testified that he had then prepared Plaintiff's Exhibit 10 for Identification, which was a map illustrating conditions when the diversion should be only partial. The map indicated that there would be a small amount [112—23] flowing down the east side designated on the exhibit "probable course." He stated the use of the word "probable" was due to the fact that it was practically impossible to exactly show just where that small stream would flow due to the irregularity of the bottom of the river, as it now exists, similar to the reef. It would have a tendency to move the thread westerly from twenty to forty or sixty feet, and in some places scarcely any distance; but dependent, as said before, upon the river bottom; but there would be a tendency to move, and that would be always in a westerly direction, and there would be undoubtedly portion of Government Lots 1 and 2 entirely dry with no water on them, and possibly in some places little pools of stagnant water would be left.

That Exhibit 9 showed a complete diversion with a water surface elevation at the headgates of the canal of 1068 with about 75 second-feet of water. (Counsel for parties are agreed that witness undoubtedly meant 750 second-feet.)

The plaintiff's Exhibit 10 for Identification was then introduced as Plaintiff's Exhibit 10. (Tr. 53.)

The witness testified that he had prepared a drawing that would show the proportion of the water in a state of nature that belongs over on Lots 1 and 2 as compared with the other property, that

(Testimony of Harry Olsen.)

he did this with reference to line A–A on Exhibit 2. It is a cross-section map and is marked

"EXHIBIT 11 FOR IDENTIFICATION."

(Tr. 53.)

As stated this cross-section was taken from the river on this line A–A, at this point through the upper reef and across the river (referring to Plaintiff's Exhibit 2).

With reference to this Plaintiff's Exhibit 2 he said this cross-section (Exhibit 11) was taken across the river at the line A–A as shown on Exhibit 2, and this was taken October [113—24] 11th, 1930, showing approximately the thread of the stream at that point, the amount of water which is on each side; that on the westerly side on Lot 8 there was approximately 340–347 cubic-feet that went through the opening into the reef. This opening the witness then marked.

The witness stated that on October 11th, 1930, the total amount of water passing through openings H and I as so shown on Exhibit 11 amounted to 347 cubic-feet per second. The rest of the flow at that time was 446 cubic-feet per second; that this roughly divides up into the ratio of one to one, that is fifty—one-half to flow is on the east side, and one-half on the west side. This would be entirely across the section designated as A–A.

That going down from the north line of Lot 1 south, down the river for a distance of 500 feet approximately, one-half of the river would, in a state of nature, be on plaintiff's Lot 1 on the west side of the thread of the stream, and from that

(Testimony of Harry Olsen.)

point on down for the next 500 feet approximately two-thirds of the stream would be on the west side and one-third on the east side; that for the next 500 feet down the stream the water would be approximately one-half on either side. The witness was then using Exhibit 11.

He stated that he also showed the blasted area and also twenty-seven feet as set up in the answer of the defendants as the amount of rock which was to be removed; that in the upper left-hand portion of Exhibit 11 is shown a cross-section of the concrete dam which if placed in the river at this point would require an additional amount of concrete to replace the rock which would have been taken out of the blasted [114—25] area. That is to say—if the plaintiff should cross the river with a dam at that section, or at that place, and it would have to replace the removed rock with concrete, the exhibit shows the amount of concrete necessary for such replacement; that it does not show figures but that the amount of concrete so necessary would be roughly 100 cubic yards, and would cost per cubic yard to replace it, $25.00.

Upon objection by the defendants' counsel the Court excluded the testimony for the present until a proper foundation had been made; that then plaintiff could introduce the exhibit without recalling the witness if the evidence is competent. (No more evidence offered.) The plaintiff then introduced in evidence

PLAINTIFF'S EXHIBIT 11. (Tr. 56.)

with the exception of concrete replacement.

PLAINTIFF'S EXHIBIT 12 FOR IDENTIFICATION. (Tr. 56.)

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED

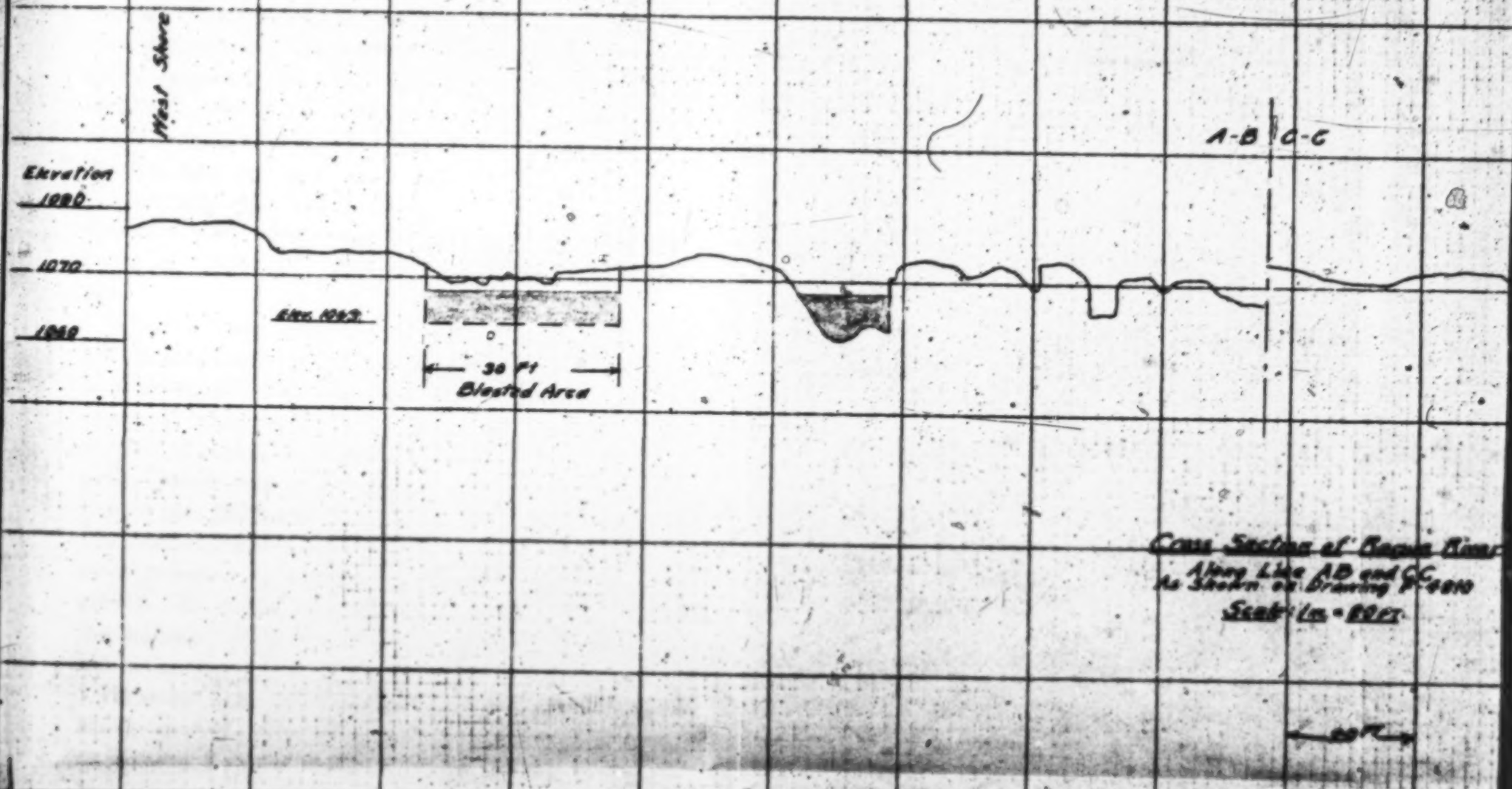
MAY 1 - 1931

G. H. Marsh, Clerk

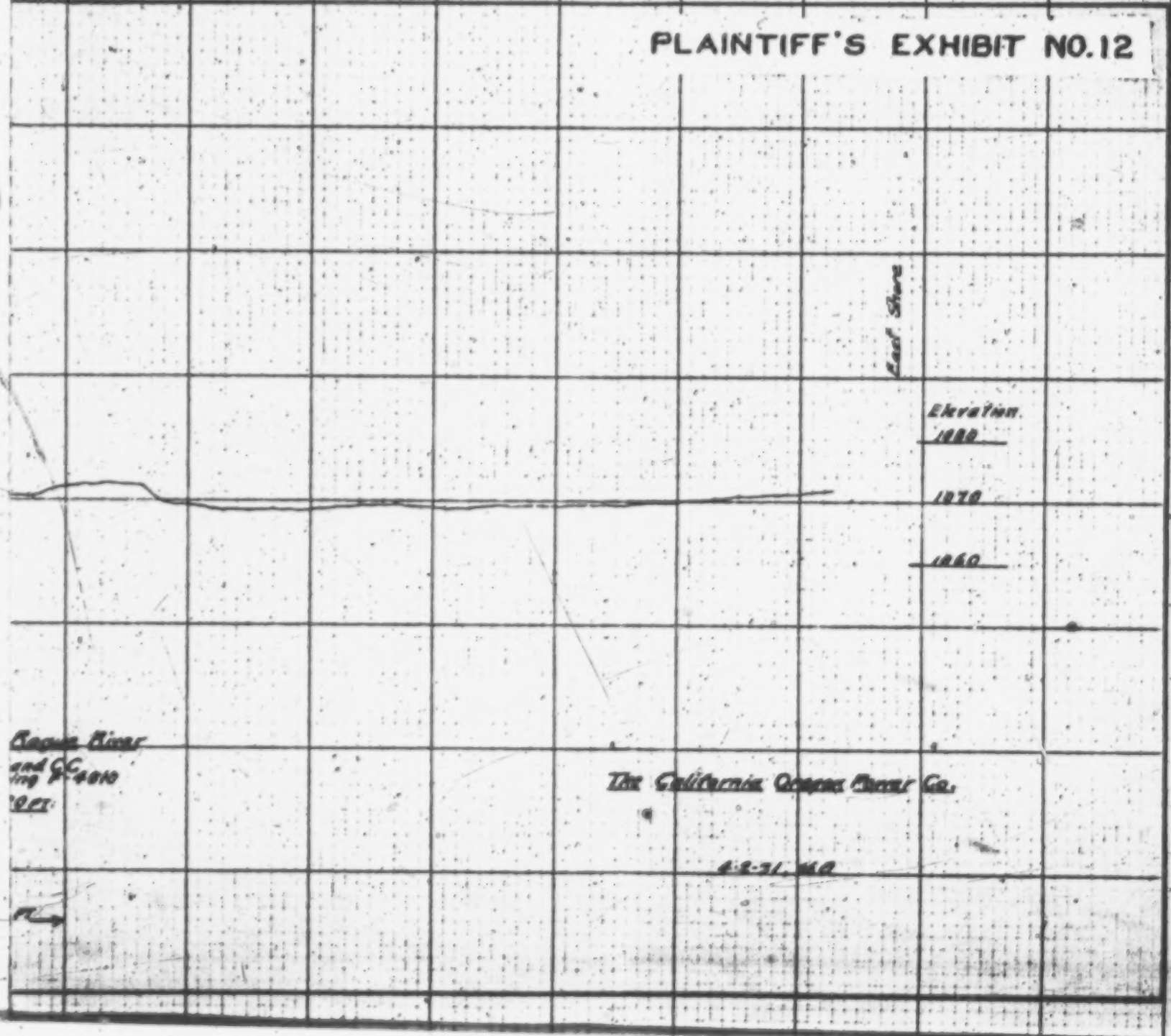
BY _____ DEPUTY

6126 4/23/31

Plaintiff's Exhibit 12



PLAINTIFF'S EXHIBIT NO. 12



(Testimony of Harry Olsen.)

The witness testified that he had prepared a cross-section showing the blasted area and the effect of removing the same. It was identified as Plaintiff's Exhibit 12 for Identification and the witness stated that this cross-section was taken from along A–B and then down, jumping to C–C. In other words—this course A–B is the reef upstream and on the west side of the river, and C–C is the reef on the east side of the river. The exhibit shows in detail what would happen if the water were drawn down to the elevation 1068 at the headgates. Then all of the water would be on the west side of the river due to the fact that the rock—the lowest point of rock on the east side—the easterly side of the reef, is about elevation 1068. The exhibits was received in evidence as [115—26] Plaintiff's Exhibit 12 (Tr. 56).

Witness Olsen was then shown Plaintiff's Exhibit 6, and shown the page marked "2" which had been referred to by Mr. Muirhead of the cement company, when the latter was on the stand, and the witness' attenion was called to that part of this profile which was at the bottom of the page, Station 19 plus 69.25 and 21 plus 17. He testified that this Station 19 plus 69.25 and 21 plus 17 covers the same territory as section C–C on Plaintiff's Exhibit 2. He stated that between these two sections, the stations, there is a heavy irregular green line indicating the rock bottom of the river at that point.

He stated that the elevations there shown by this heavy line over that section of the river indicated on Exhibit 2 as the reef at C–C, varied due to the

(Testimony of Harry Olsen.)

irregularities of the reef along the river bottom. He pointed out the following elevations: 72.7 (meaning 1072.7) down to a minimum of 68.3 (meaning 1068.3 etc); that the elevation shown over on the lines on the profile which show foot elevations, the elevations go down to 1069 and 1068,—would be approximately 68.3. The witness stated that the highest elevation of the river bed at this place has been marked "J," and is shown as 1073.3; that the lowest elevation shown between the stations designated has been marked "K" and is shown as 1068.3. He stated that when the water would be drawn down to a surface elevation of 1068 at the proposed headgates there would be no water flowing over this point in the reef. The Court said "in other words that is the point of your Exhibit 12." The witness answered: "Yes." [116—27]

Defendants' counsel asked if when drawn down to the surface elevation of 1068, the stream would be dry at that point, and the witness answered: "Yes."

Witness stated that plaintiff's land would be dry when the surface elevation should be drawn down to 1068 at the headgates.

He testified that the distance from the cement company's proposed electric plant to the company's cement mill is about 8,000 feet; that the line loss in current in that distance would be approximately 10%.

PLAINTIFF'S EXHIBIT 13 FOR IDENTIFICATION. (Tr. 58.)

PLAINTIFF'S EXHIBIT NO. 13
140

CALIFORNIA OREGON POWER CO

RIVER

ROGUE

STATE ENGINEER
RECEIVED

BEAVER PORTLAND CEMENT CO

(Testimony of Harry Olsen.)

Witness Olsen was shown Plaintiff's Exhibit 13 for identification and a copy of the blue-print in Plaintiff's Exhibit 1 for identification referred to in the testimony of Mr. Muirhead. Attention was called to the fact that sheet one of that exhibit was testified to by Mr. Muirhead where the latter had marked the red letter "A" at the arrow.

The witness' attention was called to the portion marked: "this area to be excavated six feet below low water or to elevation 1063.5 plus or minus."

He stated that he had drawn or platted the description of the blasted area to be removed according to the testimony given at the former trial of this case, thirty feet wide by 220 feet long; that this information was taken from the testimony of Allen, defendant Cement Company's engineer. That this area is the same as is shown in yellow [117—28] in Plaintiff's Exhibit 2 as there corrected by the witness to avoid an obvious error, mentioned above.

Mr. Olsen testified that the area to which the arrow points is the rock to be removed and is shown in the heavy lines. The other is shown in the dotted lines.

Comparing this with the testimony which Engineer Allen had given in the former trial, the witness said that the rock to be removed would have a width of fifty-five to sixty feet, instead of thirty feet, as testified to by Engineer Allen in the first trial of this cause.

The witness had reference to Plaintiff's Exhibit

(Testimony of Harry Olsen.)

4, a photograph taken of the place before the blasting; he stated it distinctly showed two rock islands in the foreground. But according to the revised drawing, it is indicated that the first island shown on the photograph would be entirely removed. This is according to the amended map of the Cement Company, filed April 8th in the office of the State Engineer. (April 8th of that year.) (Tr. 60.)

Cross-examination by Mr. KOLLOCK. (Tr. 61.)

The witness Olsen testified that Plaintiff's Exhibit 2 was intended to show approximately the natural condition of the river, prior to blasting; that the water is divided approximately one-half on the east side of the stream and half on the west side. This is at and above the line A–A, on Exhibit 2; that this would be above, at the head of the rocks; that within approximately the next five hundred feet downstream, the water changed two-thirds to the west side and one-third to the east side; that he [118—29] took the measurement five hundred feet southerly from B–C. That the increase of the flow of the river to the west side is caused by the reef along the line B–C; that it is the reef running north and south, and is a lower elevation than the reef C–C, and naturally allows more water to flow over towards the west side; that there is considerably more flowing through the narrows from east to west at the point immediately south of the line A–A, between that and C–C.

(Testimony of Harry Olsen.)

That he made that measurement October 11th, 1930; that he made the measurements which he mentioned in the former trial on the west side of the river, and then to determine the amount on the east side, he took the difference between the one at Gold Ray, as shown by the United States Geological Recording Gauge and what was flowing on the west side; also taking into consideration the amount then being diverted by the Gold Hill Irrigation District, that is, the 440 cubic-feet per second flow on October 11th, 1930; that he actually measured on October 11th, where the map shows 340 cubic-feet per second; that he made the measurement with a current meter, and subtracted that figure from the figure shown by the Government gauge at Gold Ray, a distance of about four miles up-stream. That he did not make any measurements of the entire flow of the stream October 11th, or at any other time, above the proposed point of diversion. The only measurement on October 11th was on the west side of the river. Any other measurements are the result of deductions from the flow of the river as measured by the Government at Gold Ray.

He stated that the cofferdam shown on the exhibit is no longer in the river; it had been removed probably a year. He indicated the concrete pier as being shown in blue. [119—30]

He testified he never measured the flow of the channel that leads to the west below the line A–B to determine the flow there that he has measured the flow of what is known as the narrows between

(Testimony of Harry Olsen.)

these two, and made the measurement October 11th. He said the total flow between those points was 347 feet. At that time the flow over the blasted area was approximately three second-feet; so the flow at that time through the narrows could be placed at 344 second-feet. That he made no approximation as to the amount coming in from the west to the east side at that point.

He stated he believed the defendants contemplated closing the entire channel that flows from the east to the west. He stated that he had platted the blasted area as a tract approximately 44 feet in width. The depth of the shattered area he had indicated in the lower part of the red area as eight feet below. It is indicated as an elevation of 1062. He said the exhibit indicated a point seven feet below the lowest point of the stream.

The witness testified that the showing on the exhibit as to the depth of the drilled holes was taken from the answer of the defendants; that holes were drilled to a depth of eight feet. So that he just took the average elevation of the rock at that point and showed it at eight feet below that. He testified that he measured some of the drilled holes personally. One particularly that he made a note of was seven feet deep and at that time the top of the hole was about six inches abo*t* the water. That he actually obtained a depth of seven feet in the rock; that the depth of the drilled holes is really based upon the defendants' answer. That the 44 feet is a maximum width that he found at one

(Testimony of Harry Olsen.)

particular point; he [120—31] does not know whether there were any other points equal to that. The measuremnt was made on the one point. That the tendency of the work done and proposed to be done by the Power Company (meaning Cement Company) in the development of their power would have a tendency to carry the entire stream or current of water, the body of the water, from the east side to the west side of the river. That the tendency would be to push the current over; that it would take all of the water under the condition if the defendants maintained an elevation of 1068 at its headgates. He stated that his idea that the east side of the river would be made dry is based entirely upon the proposition that the elevation would be reduced to 1068 at the headgates. Asked how he arrived at that figure he said:

"Knowing that the controlling factor on drying up the east side of the river, is that reef C–C, the lowest part of which is 68 feet, (meaning an elevation of 1068) if the water is dropped below that, wouldn't any water go over; the lowest point of the reef is 1068." He took this from sheet 2 of Plaintiff's Exhibit 6, the profile. (Tr., page 68.)

He stated that his estimate of 1068 at the headgates and the conclusion drawn that a reduction at that point would dry the river down below the reef, is based on the diagram or profile made in 1926. (This is defendant Cement's Company's profile, heretofore testified to.)

He admitted that since 1926, to wit: In 1927, there was unusually high water in the river, but

(Testimony of Harry Olsen.)

denied any knowledge that it carried away any rocks at the point in question or where the blasting was done. He denied any knowledge that the third island existed as shown on the original maps has not been there since the winter of 1927. [121—32]

That he did not know whether the defendants' said profile correctly showed a cross-section of the river at C–C, but he presumed that it did. That his testimony was based on the assumption that this profile correctly showed the cross-section at that point. (Tr. 69.)

He testified he did not know that the old crib had been washed out in 1927; that he had never seen the crib.

He testified the condition shown on Plaintiff's Exhibit 9 could only happen under his theory if the elevation of the headgates were reduced to 1068. He testified that the elevation at the point of diversion would be slightly higher than 1068 if the surface elevation were reduced to 1068, and would be the difference in the drop or fall, a small fall to take care of the flow of the stream; that the defendants have done nothing more than blasting towards their construction so fars as the witness knows. That they had not lowered the headgates but that he had not been down to the canal.

He testified that the controlling factor as to the amount of water which would be drawn from the upper part of the stream and diverted from the east side would be the amount of power required by the Cement Company at the cement mill.

(Testimony of Harry Olsen.)

That as far as the physical construction is concerned the only thing necessary now to be done to draw off the entire flow, would be to remove the rock in the blasted area, and deepen the canal; that the canal would have to be deepened from three to four feet. His testimony is based upon his studies showing that it would have to be lowered three to four feet; that there would have to be some widening in line with the cross-section shown in Plaintiff's Exhibit 6, sheet 4, which [122—33] would be the same as Sheet 4 of Plaintiff's Exhibit 7.

That the increase in the cross-section of the canal would vary; that the canal at present, that is, the old canal, varies in cross-sections—and,—here he was interrupted and asked with reference to a point just below the headgates at the opening of the canal, and stated:

There would have to be a lowering of the bottom of the canal three feet, 3 to 4 feet, and providing a bottom width of, say 65 feet, that is 60 to 65 feet, and side slopes one and a half to one. That this is quite an increase over the present width of the canal at that point, although he did not know the present width.

As to Exhibit 10 he said this was supposed to indicate a partial diversion; that it would be difficult to state how much water would be flowing through the probable course of the canal on the stream, as indicated on the exhibit. The exhibit indicates no definite amount of water. That the exhibit is made to illustrate the thread of the stream

(Testimony of Harry Olsen.)

regardless of the quantity of water flowing in the stream, and based upon an elevation of 1069 at the headgates. That no one could make a calculation of the amount of water flowing over the irregular reef at 1069; that it has a very irregular surface, and he did not make any calculation; that he did not think an engineer could make a very accurate determination of the flow over the reef at a stage of 1069 and 1069.4 but only an approximation.

That he had attempted to approximate it, but it would vary from 50 to a hundred second-feet; that the range would be greater than that, ranging from thirty to one hundred second-feet; the examination was all with reference to Plaintiff's Exhibit 10.

That the red line indicates where in the witness' opinion the thread of the stream would be, were any water flowing [123—34] over the natural barrier there, that is, with a relative small amount of water. That his definition of the thread of the stream is a line which is equidistant from all points on opposite shores at right angles to the thread of the stream at low water. That it is based entirely on the surface of the water as it comes in contact with the land at low water, and does not take into account the volume of water at any particular point.

That if from fifty to one hundred second-feet of water was flowing evenly over the entire width of the reef, that then the thread of the stream would be moved westerly instead of as shown on the ex-

(Testimony of Harry Olsen.)

hibit. That if the flow were uniform over the reef, conditions would be as shown in Exhibit 2, without change.

That the blasting and shattering of the rock has not now made any perceptible change in the thread of the stream; that is, not materially; that no change in the surface had resulted nor had there been any increase of flow to the west bank of the river. It might be that by reason of the shattering of the rock and a more or less filling of the channel, more water might have been forced to the east side; that it was not his conclusion as an engineer, taking into account everything that has been done, such as shattering of the rock, and leaving it where it fell, more water is flowing down the east side than down the west side at the present time; at least, not all the way through, it probably comes back and around again—back through the east and west channel. But that as far as north of this island is concerned, probably more water is going to the east than to the west at the present time.

That the fact that the defendants had filled up the channel a little more might probably put a little more water to the other side, and if you removed more of the shattered area, it [124—35] might probably come back and better the condition. For the same reason if you put in now something to obstruct it, if you took out more than before, the tendency would be more water to come through down the west side. The additional water could not be carried unless the defendants increased their

(Testimony of Harry Olsen.)

channel. That the controlling factor of injury to the plaintiff would be in the lowering of the canal and increasing the carrying capacity of that canal. That what has been done and what will be done in the removal of the rock will just make a little more flow down through the canal, and would come back because the opening is a little wider.

The witness testified that he took a reading of the record chart located as Gold Ray over a period which would allow the water to get down to the point in question, and that the flow was very even at the time he took the 440 cubic feet per second measurement. That he did not take the average reading for the day; that there is considerable fluctuation at the Gold Ray station; that he took the measurement at a time sufficient to allow the water to get down to the point in question.

TESTIMONY OF J. C. THOMPSON, FOR PLAINTIFF.

J. C. THOMPSON, plaintiff's witness.

Examined by Mr. REAMES. (Tr. 80.)

Testified that he is 46 years of age; has been Division Manager of the plaintiff for about four years.

The plaintiff sought to prove that C. W. Martin, in charge of the Cement Company's blasting operations on July 22d, 1930, had stated to plaintiff's witness, J. C. Boyle, in the presence of Mr. Thomp-

(Testimony of J. C. Thompson.)

son, [125—36] that they (defendants) intended to continue the blasting and take all of the water.

Thereupon the following occurred:

Q. (By Mr. REAMES.) What was said, if anything, with reference to the intention of the defendant Cement Company, with reference to the blasting?

Mr. KOLLOCK.—I object to that as incompetent, irrelevant and immaterial. There is no competent testimony here to show that Martin was authorized to speak for the company, a corporation, as to its intention. Mr. Thompson was not there while the operations were being carried on; he came the next day and saw Martin; Mr. Martin is an employee of the company, but I submit there is no evidence to show he was empowered to testify as to the intention of the corporation; he is not an officer of the corporation; a mere employee; not in charge of the work. Mr. Muirhead was there himself. He is the one that can speak for the company's intention.

Mr. REAMES.—May I suggest that this witness testified Mr. Martin was the one in charge.

Mr. KOLLOCK.—On the day he got there, the day after the explosion.

COURT.—In charge, but I don't think a man in charge of the work—he might be a foreman.

Mr. KOLLOCK.—That is what he was.

Q. Was there any conversation in which Mr. Martin said what the intended to do in this blasting? A. Yes, sir.

(Testimony of J. C. Thompson.)

Mr. KOLLOCK.—Same objection to that, your Honor.

Mr. REAMES.—I want to find out what he said he was going to do; he was in charge of the work, and I want to know whether he said anything as to what he was going to do.

Mr. KOLLOCK.—Was going to do what the company told him to do, I take it.

COURT.—I think I will have to sustain the objection, unless this man is shown to be an officer or someone who this Court will rule [126—36-a] is in power to speak for the company as to its intention.

Q. What was his position with the company, Mr. Thompson?

A. He is the superintendent of the cement plant, and the man with whom I do my business in relation to the delivery of power.

Mr. REAMES.—I don't know to what extent the testimony that has been introduced is considered in evidence—the testimony taken before. That same testimony was given by Mr. Boyle, who was the other party to that conversation, and whether it is in evidence or not makes quite a little bit of difference with me, as to whether I should follow this.

COURT.—The Court admitted it for all purposes without objection, so I presume it is in evidence.

Mr. KOLLOCK.—I don't think that would be competent testimony. I would submit further, in

(Testimony of J. C. Thompson.)

the matter of intention, it is the intention of the officers. Mr. Muirhead, the vice-president of the company, has been made a witness for the plaintiff, and has testified definitely what the intention was, lowering the canal, and carrying the water. No question about what the intention was, and in their own direct examination they have brought that out.

COURT.—Was this testimony objected to before?

Mr. KOLLOCK.—I don't think it was. I think we didn't consider it—

Mr. REAMES.—Moreover, Mr. Martin sat in the courtroom and was not called to dispute it.

COURT.—The evidence, so far as it is in the record is evidence, as the Court permitted the document for all purposes; if it is in there, the Court will consider the testimony for whatever weight the Court may give it. But the Court is not going to make a rule at this time that an employee of the company can speak for it. [127—36-b]

Mr. REAMES.—I am offering to show—may I state what I am going to show—I am offering to show the conversation that was testified to by Mr. J. C. Boyle at the former trial; so that will identify what I propose to do. I say in this connection that this man was in charge of this work, and told these two gentlemen what he proposed to do with reference to taking water on that side of the river; he told them what he was doing and going to do.

(Testimony of J. C. Thompson.)

COURT.—You can take it over the ruling, if you wish. If it is not sufficiently in the record, you can take it over the ruling.

Mr. REAMES.—I would not care to do that. I am just saying that I am offering to prove simply the same as shown in the testimony of Mr. Boyle, but that would also exclude the testimony of Mr. Boyle, on the same ground. I would not care to take the time of the Court on that. I had thought that since he was the man in charge of the work he was qualified to say what he was doing.

Mr. KOLLOCK.—The work had all been terminated the day before the interview.

Mr. REAMES.—Only begun; the dynamite had been exploded but this area was to be removed for the purpose of taking the water of the river on that side.

COURT.—There is testimony to that effect in the record now, as I understand the record. It would be simply cumulative.

Mr. REAMES.—Mr. Muirhead testified he intended to remove that.

COURT.—And as I understood, to take the water.

Mr. REAMES.—Not all the water; he said all they could take economically, to the extent of their permits.

COURT.—Went very carefully into how much could do. [128—36-c]

Mr. REAMES.—Mr. Muirhead says he said they are going to take all the water up to the extent of

(Testimony of J. C. Thompson.)

the permits that they can get in that way, and if that is an admitted fact in the case—

COURT.—He has testified to that. I understood he testified to that this morning. The Court on this showing will have to sustain the objection now, but as far as the record is concerned, I think it already shows it."

The witness testified that the property in controversy had a value in excess of $30,000.00; that the plaintiff had acquired the property for the purpose of erecting thereon a hydraulic plant.

The witness testified that the property was located just above the Pacific Highway between Grants Pass and Medford, and had unusual value as a stand-by plant. Explaining the meaning of the term "stand by plant" he said that such utilities, where their plants were removed from the center of distribution, usually maintain steam plants near the center of distribution, but that this plant would serve the same purpose that a steam plant would serve. It would be located near the center of distribution there, 12 miles from Medford, and equidistant from Grants Pass, and enable the Company to give stand-by service at Medford and Grants Pass, and at the Cement Company's plant at its quarry and the Illinois Valley. That the company was then building into the Illinois Valley.

He explained that the plaintiff's closest plant of [129—37] any size was at Prospect, approximately forty miles from the site in controversy, and back in the mountains on the upper Rogue River; that

(Testimony of J. C. Thompson.)

there were also plants in California, the Copco plant on an air line being about one hundred fifty miles from the site in controversy; that the transmission line comes into Medford over mountainous territory over the Siskiyou mountains. That the line is located in a territory subject to heavy snowfall, and subject to interruptions by the falling of trees on the line, so that a stand-by plant, such as is described, is partly used for protection against interruption in the service. Besides that, this plant would generate quite a little bit of power, estimated in 1926 to be about 5500 horse-power.

Asked what the plaintiff had done since it acquired this property on the 11th day of March, 1921, in the way of installation of power to carry out its obligations in the territory supplied by the utility, he answered:

That in 1922 it put in a second unit at Copco Number 1 of 18,000 horse-power, cost roughly $600,000.00; in 1923 and 1924 it put in the east side Klamath Falls plant of 4,200 kilowatts, cost approximately $600,000.00; in 1925 it put in Copco Number 2 with 44,000 horse-power at a cost of three million dollars. In 1926 and 1927 it finished the plant of 44,000 horse-power, estimated to cost three and one half million dollars; that in July, 1926, defendant city offered for sale its hydro-electric plant and plaintiff sought to purchase it, and submitted an offer of $40,000.00 for the plant. The defendant cement company offered $22,600.00 with practically the same conditions, except that

(Testimony of J. C. Thompson.)

the plaintiff's [130—38] was for cash, and the Cement Company's for one hundred dollars a month. That the propositions were submitted to an election resulting favorably to the Cement Company.

At this point the plaintiff offered to prove its ability and willingness to build a plant, if given an opportunity to, but the Court held that this was anticipating, and for the present sustained the objection.

The witness testified that the Public Utility Commission fixed plaintiff's rates as such public utility in the territory served, and the company filed its rules and regulations with the commission. These were produced and marked

PLAINTIFF'S EXHIBIT 14 FOR IDENTIFICATION,

being duly certified to, and offered in evidence, they were admitted by the Court. (Tr. 89.)

Plaintiff's Exhibit 14 is a certified copy of the Oregon Public Service Commission's Rules and Regulations, with the rates fixed by such commission to govern plaintiff's charges for electrical current to be furnished by it as a public utility operating in Jackson County, Oregon, and elsewhere.

The witness testified that the plaintiff had since the establishment of these rates complied with the requirements of the commission, and that the prop-

(Testimony of J. C. Thompson.)

erty in question is necessary as a part of the company's property for its compliance with these public requirements. The property is very necessary and very desirable.

The witness testified that the amount of power consumed by the City of Gold Hill is less than 170 horse-power within the city limits. This is the maximum demand. He testified that a kilowatt is three-quarters of a horse-power. [131—39]

THE DECREE OF MAY 3d, 1911. (Cause No. 3098.)

This was Plaintiff's Exhibit Number 7 in the first trial.

Plaintiff also offered in evidence the certified copy of the decree of December 20th, 1929, between these parties, cause Number E.-8991, being a final decree, rendered in accordance with the mandate of the Circuit Court of Appeals. The two exhibits were admitted, the decree of May 3d, 1911, as Exhibit Number 15.

PLAINTIFF'S EXHIBIT No. 15.

In the Circuit Court of the United States for the District of Oregon.

BE IT REMEMBERED, That on Wednesday, the 3d day of May, 1911, the same being the 21st judicial day of the regular April Term of said court, the following proceedings, among others, were had before the Honorable ROBERT S. BEAN, United States Distict Judge for said District, to wit:

[Endorsed]: U. S. District Court, District of Oregon. Filed Oct. 14, 1930. G. H. Marsh, Clerk.

U. S. District Court, District of Oregon. Filed May 1, 1931. G. H. Marsh, Clerk.

Plaintiff's Ex. 15. E.–9126. 4/23/31.

No. 6874. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 18, 1932. Paul P. O'Brien, Clerk

In the Circuit Court of the United States for the District of Oregon.

No. 3098.

SUIT FOR AN INJUNCTION AND OTHER RELIEF.

CONDOR WATER & POWER COMPANY, a Corporation,

Plaintiff,

vs.

GOLD HILL CANAL COMPANY, a Corporation, and OREGON WATER & POWER COMPANY, a Corporation, Defendants.

DECREE.

This cause came on to be heard on the 9th day of February, 1911, at this term, argued by counsel and taken under advisement; and thereupon and upon consideration thereof, it is ordered, adjudged and decreed as follows, viz.:

That the plaintiff is the owner and entitled to pos-

session of the following described lands situate in the County of Jackson, State of Oregon, to-wit:

Lots one and two in Section Fifteen Twonship Thirty-six south of Range Three West of the Willamette Meridian, which lands are lying and situated along the bank of Rogue River; that said Rogue River is a non-navigable stream and that the plaintiff's ownership of said lands extends under the waters of said river and includes the bed thereof lying in front of said Lots one and two to the middle of said channel or the thread of the current of said stream; that the Gold Hill Canal Company, a corporation, in the year 1906 and before the filing of the complaint herein in the Circuit Court of the State of Oregon for Jackson County, began constructing a dam across Rogue River and on the lands of the plaintiff; that the defendants or either of them had no right or privilege to construct said dam upon the lands of *of* the plaintiff, said lots one and two except the right of maintaining a dam in and across Rogue River opposite said lots one and two from a point on the bank of said river on the land occupied by said defendants to a point on said Rogue River where now stands a crib or crib work forming and constituting a part of a dam previously constructed in said Rogue River and constituting the end thereof on the side of the middle of said river nearest the property held or claimed by the plaintiff, and of the heighth which said cribs were originally constructed; that the Gold Hill Canal Company and its successor, Oregon Water & Power Company, and all persons claiming by, through or under either of

said corporations are hereby forever enjoined and restrained from building or maintaining on said lots one and two in said section Fifteen or the riparian lands in front of said lots one and two extending from the shore line thereof to the middle or current of said stream, any dam or other obstruction or structure except a dam that may be constructed from a point on the bank of said river on the land occupied by said defendants to a point in said Rogue River where now stands a crib or crib work forming and constituting a part of a dam previously constructed in said Rogue River and constituting the end thereof on the side of the center of said river nearest the property held or claimed by the plaintiff, and of the same heighth at which said dam was maintained or constructed.

That the preliminary injunction heretofore granted in this suit be dissolved and vacated and set aside as to any and all acts not enjoined by this decree.

It is further ordered, adjudged and decreed that neither party shall recover its costs.

Dated this 3rd day of May, 1911.

R. S. BEAN,
Judge.

O. K. except as to costs, that section to be left to his Honor Judge Bean.

GEO. H. DURHAM,
Of Solicitors for Defts.
ROBERT G. SMITH,
Attorney for Plaintiff.

Filed May 3, 1911. G. H. Marsh, Clerk.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Decree in cause No. 3098, Condor Water & Power Company vs. Gold Hill Canal Company and Oregon Water & Power Company, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 7th day of March, 1928.

[Seal] G. H. MARSH,
Clerk.
By F. L. Buck,
Chief Deputy Clerk.

The decree of *May* 20th, 1929, as Exhibit Number 16. (Tr. 92.)

PLAINTIFF'S EXHIBIT No. 16.

In the District Court of the United States for the District of Oregon.

BE IT REMEMBERED, That on Friday, the 20th day of December, 1929, the same being the 34 judicial day of the regular November term of said court, the following proceedings, among others, were had before the Honorable ROBERT S. BEAN,

United States District Judge for said District, to wit:

[Endorsed]: U. S. District Court, District of Oregon. Filed Oct. 14, 1930. G. H. Marsh, Clerk.

U. S. District Court, District of Oregon. Filed May 1, 1931. G. H. Marsh, Clerk.

Plaintiff's Exhibit 16. E.-9126. 4/23/31.

No. 6874. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 18, 1932. Paul P. O'Brien, Clerk.

In the District Court of the United States for the District of Oregon.

No. E.-8991.

THE CALIFORNIA OREGON POWER COMPANY, a Corporation,

Appellee,

vs.

CITY OF GOLD HILL, a Municipal Corporation, and BEAVER PORTLAND CEMENT COMPANY, a Corporation,

Appellants.

MODIFIED DECREE.

An appeal having been taken to the United States Circuit ~~District~~ Court of Appeals for the Ninth ~~District,~~ Circuit from the decree heretofore entered herein, and the mandate of said appellate court having issued on the 21st day of November, 1929, and having been duly

filed herein on the 25th day of November, 1929, and said mandate having directed the modification of said original decree, and the said decree, as so modified, having been affirmed, it is now

ORDERED, ADJUDGED AND DECREED as follows:

That the plaintiff, The California Oregon Power Company, a public service corporation organized and existing under and by virtue of the laws of the State of California and qualified to transact business in Oregon, is the owner and entitled to the possession of lots one (1) and two (2) in section 15, township 36 south, range three (3) west of the Willamette Meridian, Jackson County, Oregon, and which lands lie and are situated along the bank of Rogue River, which is a non-navigable stream. That plaintiff's ownership of said lands extends under the waters of said river, and includes the bed thereof lying in front of said lots, and to the middle of the channel or thread of the current of said stream. That the defendant, City of Gold Hill, Oregon, is a municipal corporation existing under and by virtue of the laws of the State of Oregon, and is the owner and in possession of lots six (6), seven (7) and eight (8) in said section 15, and which lands lie on the opposite side of said stream and border thereon. That the defendant City's ownership of said lands is subject to the terms and conditions of a certain option to purchase the same by the defendant Beaver Portland Cement Company, which is a private corporation organized and exist-

ing under and by virtue of the laws of the State of Oregon.

That heretofore, on the 3rd day of May, 1911, there was pending in this court Cause #3408 entitled "Condor Water & Power Company, a corporation, Complainant, vs. Gold Hill Canal Company, a corporation, and Oregon Water & Power Company, a corporation, defendants." That on that day a decree was duly made and entered in said cause decreeing that said Condor Water & Power Company was the owner of said lots one and two extending under the waters of said river, and including the bed thereof lying in front of said lots, to the middle of said channel or the thread of the current of the said stream. By said decree the said Gold Hill Canal Company and its successor, said Oregon Water & Power Company, and all persons claiming by, through or under either of said corporation, were forever enjoined and restrained from building or maintaining on said lots 1 and 2, or the riparian lands in front thereof to the middle of the current of said stream, any dam or other obstruction or structure, except a dam that might be constructed from a point on the bank of said river on the land occupied by said defendants in said cause to a point in said river where then stood a crib or crib work forming or constituting a part of a dam that had been previously constructed in said river, and across the thread of said stream on said lot 1. That the plaintiff herein has succeeded by mesne conveyances to all of the right, title and interest of said Condor Water & Power Company in and to all

of said lots one and two, and to all of the rights of said company under said decree.

That the defendant City of Gold Hill has succeeded to and owns all of the right, title and interest of said Gold Hill Canal Company, and said Oregon Water & Power Company, in and to said lots 6, 7 and 8.

That said dam so authorized by said decree to be built and/or maintained, across said river to the crib or crib work referred to in said decree, was never constructed, nor was any attempt ever made to build a dam at the place specified in said decree prior to the actions of the defendants herein in August, 1928, set out and alleged in the complaint. That following the rendition of said decree in 1911, the said Oregon Water & Power Company continued for some years to be the party in interest in said lots 6, 7 and 8 and in the power plant to be constructed therein and therefrom, but made no effort to construct or maintain a dam under the terms of said decree, and abandoned the right to so construct and/or maintain any dam, or any structure upon any part of said lots 1 or 2, but did not abandon and still has its easement in the site of the old crib or pier to the extent of the dimensions thereof as herein determined; and neither the defendants nor their successor in interest in the ownership of said lots 6, 7 and 8, and in the ownership of the electric plant which the defendants were reconstructing at the time of the institution of this suit, have any right, under the terms of said decree

of May 3rd, 1911, to either build, construct or maintain any structure except as herein decreed.

That at the time of the institution of this suit, the defendants were constructing on the plaintiff's side of the middle of said stream, and on lot 1, and at or about the point where the crib work mentioned in said decree of 1911 had been constructed, a cement pier from which they were building a coffer-dam, to later be filled with cement, as a part of a dam to be constructed across said river to said lot 8. That the defendants had already built on plaintiff's said land at said point cement works of a permanent nature for the purpose of diverting the waters of said stream from plaintiff's said land. That all of said construction work by the defendants upon plaintiff's side of the center of said stream and upon said lot one, was wrongful and without right, except that the defendants have the said easement on the site of said crib or pier to the extent of the size and dimensions of said crib or pier, and had and have an easement upon said lot one therefor.

That the defendants and each thereof, their agents, servants and employees, and all others in the aid or behalf of either thereof, be, and they and each of them hereby are, forever enjoined from building or maintaining any structure or diversion or obstruction works upon any part of said plaintiff's lots one and two, as the same extend under the waters of said river, and to the middle of the channel or the current of said stream, except that it may exercise said easement on the site of such old crib or pier, and to the extent of the size and dimensions thereof as herein determined.

That this injunction applies to the successors in interest of the City of Gold Hill, and of said Beaver Portland Cement Company in the ownership of said lots 6, 7 and 8, and in the ownership of the power plant of said City of Gold Hill situated upon a portion of said defendant City's said property.

That said old crib or pier herein referred to and for which defendant City has said easement is situate on the said lot 1; the most southwesterly corner of said old crib or pier bore north 88° 30′ east and distant 168 feet from a point on the west bank of Rogue River marked by a surveyor's stake and distant 400 feet south from the north quarter corner of section 15, township 36 south, range 3 west of the Willamette Meridian, and also bore north 54° 16′ east from a point on the west bank of said river 516.14 feet south from said north quarter corner; the most northwesterly point of said old crib or pier bore north 4° 30′ 47″ each from such southwesterly corner of said crib a distance of 80 feet; the width of said old crib or pier was 10 feet; and its height was 4 feet above low water.

This decree is without prejudice to such rights, if any, as either party to this suit may have under the principle of riparian rights or by appropriation. The water rights, if any of the parties to this suit, whether claimed under the riparian doctrine, or under the doctrine of appropriation, are not determined.

IT IS ORDERED, ADJUDGED and DECREED that the plaintiff have and recover from and of the defendants herein the plaintiff's costs

and disbursements hereinbefore taxed and allowed at $105.45. That the defendants recover from and of the plaintiff one-half their costs, expended upon such appeal, and taxed in said mandate at $234.63. That said judgments be, and the same hereby are, offset so that the defendants have and recover from the plaintiff the difference in said judgments for theid costs, to wit, $129.18, and that execution issue therefor.

Dated December 20, 1929.

R. S. BEAN,
Judge.

Filed December 20, 1929. G. H. Marsh, Clerk. By H. S. Kenyon, Deputy.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Modified Decree, in cause No. E.-8991, The California Oregon Power Company vs. City of Gold Hill et al., has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 24th day of December, 1929.

G. H. MARSH.

[Seal]

G. H. MARSH,
Clerk.

_____,
Chief Deputy Clerk.

(Testimony of J. C. Thompson.)

There were then introduced from the judgment-roll in E.-8991 the complaint, answer and replication to be supplanted by certified copies. The ensuing colloquy resulted in the introduction of the judgment-roll, including the opinion as

PLAINTIFF'S EXHIBIT NUMBER 17.
(Tr. 93.)

J. C. THOMPSON, cross-examination:

(Questions by Mr. NEWBURY.)

He testified that he had been employed by The California Oregon Power Company since 1920; he was employed during his first years of service as Assistant General Agent, and through subsequent promotions advanced to the position of Division Manager, which position he holds at the present time. He is quite familiar with the activities of the corporation ever since he has been connected with it, and is familiar with the fact that the plaintiff, The California Oregon Power Company, had acquired this property that is known as Lots 1 and 2, from the predecessors in interest of The California Oregon Power Company, and knew that the parties who had started in with the development of the electric light and power company out there were the Condor Water and Power Company. [132—40]

He was then asked and answered:

"Q. Now you say that this tract of land there and this place where the Beaver Portland Cement

(Testimony of J. C. Thompson.)

Company are now endeavoring to put in a plant is necessary as a stand-by plant for the California Oregon Power Company?

A. The entire development is; yes.

Q. How long a time has that been a necessity for the California Oregon Power Company?

A. Since 1920." (Tr. 95–6.)

In response to a question as to whether the plaintiff has from the time it acquired the property taken any step towards the installation of a plant there as a stand-by plant, and as to whether any work had ever been done upon the ground there to indicate that it intended to do anything of that kind, he answered, "I don't know whether you call it work or not, but preliminary engineering studies have been made of the property in 1926; that prior to that time there had been a general plan," which witness stated he "had not seen."

Mr. Reames at this point suggested that there seems to be a necessity for a correction of a statement running all through the testimony, in that the property was not acquired by the plaintiff corporation until March 11, 1921.

The witness further stated that there had been plans for the development of this property between 1921 and 1931. Asked to explain when such plan was adopted, he stated that the plan about which he knew definitely was made in 1926, and another later; that at the time the 1926 plan was made, the Beaver Portland Cement Company was proposing to enter into a contract with the City of Gold Hill

(Testimony of J. C. Thompson.)

with reference to their power development there; that because it was necessary to submit something to the head office of the company in Chicago in order to get the money—the money to put in the plant, so that they could tell the voters of Gold Hill positively that we were going to make developments.

The witness further stated that he had personally no information about preliminary plans prior to that time. [133—41]

Witness further stated that so far as his information went, the company prior to 1926 made no definite plans for the improvement of the site.

Witness stated that it was necessary to make arrangements with Chicago—that elections were about to be held, and they (the plaintiff corporation) were bidding for the property, and it was necessary to get authority to spend a certain amount of money, and before the plaintiff could get authority, it was necessary to have a budget approved, and at that time they went into more details as to the amount which it would be necessary to spend in order to put in the plant we wanted to put in; that the home office of the plaintiff corporation in Chicago, to which reference had been made, was the office of H. M. Billesby & Company in 1926; that he did not know when connections were made with H. M. Billesby & Company; that the Company made its development at Prospect in 1927 or 1928; that prior to that time there had been established at Prospect a power plant of about 5,000 horse-power

(Testimony of J. C. Thompson.)

capacity, which was increased by the new installation of 44,000 horse-power.

The witness further testified that they had a power plant known as Copo No. 1 and Copo No. 2 situated in California; Copo No. 1 having been put in previous to 1922; the second unit was put in in 1922, and Copo No. 2 was installed in 1925 and 1926. Asked as to the capacity of these different plants, the witness stated that Copo No. 1 plant was put in as an additional unit of 18,000 horse-power, making two 18,000 horse-power units, or a total of 36,000. Copo No. 2 has two 20,000 horse-power units, aggregating 40,000.

Witness further stated that the increase of capacity at Prospect and Copo No. 1 and Copo No. 2 did not very largely, or at all, do away with the necessity for a stand-by plant at Gold Hill, but rather aggravated the necessity, and stated "but as a community grows, the greater requirement for a stand-by in that community." Asked to explain this further, the witness stated "We have a transmission line that runs straight through the territory east of Medford and Grants Pass; that the Prospect feeds into that as well as the Copo plant; the plants are interconnected; the line that feeds in from Prospect and Gold Ray is the line that feeds into the Rogue River Valley from Prospect." [134—42]

The witness repeated his statement made previously that the necessity for a stand-by plant at the site in controversy had always existed.

(Testimony of J. C. Thompson.)

The witness testified that they intended to bring the Red Blanket covered by application No. 9227, South Fork of the Rogue River 9228, and the North fork of the Rogue River No. 9229 over to the Prospect plant that they had in addition application No. 9330 for 3400 horse-power at Mill Creek, and also Klamath River No. 2 for 13,607 horse-power, making a total of 171,663 horse-power covered by the above-mentioned applications, and that they also had applications covering power at the North Umpqua Clearwater site, and that at Link River there had been adjudicated under applications No. 1118 and No. 5541, 563 horse-power, and also applications numbered 1503, 3026 and 2856 at Keno, with a total of 2188 horse-power, but that the plant at Geno was at least 150 miles from Gold Hill. He also testified further in reference to the plant at Gold Hill, originally the property of the Condor Water and Power Company, adjudicated at 3,409 horse-power, that it was now being operated by the plaintiff corporation. Also being interrogated in reference to an application for Hellgate on the Rogue River, he stated that he did not believe they had any applications pending, but that they owned property sites in that vicinity acquired as sites for the development of power; that a tentative layout had been made by the company; that if carried out would be a very large development located about 15 or 20 miles below Grants Pass, perhaps somewhat less than that by the river; that the plant at Hellgate, if constructed, would be on

(Testimony of J. C. Thompson.)

the same line for which the company is needing the stand-by at Gold Hill; that the company could make a very much larger development of electricity at Hellgate that they could at the site in controversy at Gold Hill, and that if that plant was established it could be used as a stand-by as well as the proposed plant at Gold Hill.

Asked further as to the tentative plans for construction at the site in controversy at Gold Hill, the witness testified that in 1926 the company was going to build a dam across the river in the bed of the stream just above the old highway bridge, and at the point where they proposed to construct this dam was between three-quarters of a mile and a mile [135—43] down the river from the point where the Portland Cement Company and the City of Gold Hill proposed to establish their plant. The witness' attention being called to the legislative enactment of 1929 asked whether since the legislation enactment of 1929 the company still had plans for this construction, the witness stated that "they had," his understanding being that the enactment did not in any way interfere with such construction." Asked whether he knew about the enactment of the law of 1929 referred to by Mr. Newbury, prohibiting the construction of power plants in the Rogue River west of a certain point, somewhere near Prospect. He answered that he knew about it.

(Testimony of J. C. Thompson.)

J. C. THOMPSON, redirect.

(Questions by Mr. REAMES.)

Asked further in reference to the Hellgate site, the witness stated that it was approximately 15 miles from Grants Pass. He stated that in his opinion it would be, by road, approximately 35 or 40 miles; that he knew nothing about the comparative costs of the two plants; that it would operate as a stand-by for Grants Pass, but not for Medford; that it would be approximately as far from the site in controversy at Gold Hill as the Prospect plant; that the Hellgate site was located in the mountainous country below Grants Pass; that all of the numerous filings referred to on cross-examination by Mr. Newbury, were all between Keno and the Copo plant downstream from Keno. The properties known as the Canyon projects are all in Oregon below Spencer bridge. Keno plant is located below Keno that some certain legal difficulties came up in connection with the utilization of that site; and that the construction is held up on some legal question.

The witness stated that a notice of the negotiations with the home office of the company in Chicago in 1926 was sent to the Mayor and city council of the City of Gold Hill and to all of the voters of that city, stating that if the proposition made by The California Oregon Power Company was approved, the company would go ahead immediately with the construction, and a letter [136—44] signed by Paul B. McKee, Vice-President and General

(Testimony of J. C. Thompson.)

Manager of the company, marked Plaintiff's Exhibit 18, was introduced in evidence reading as follows:

PLAINTIFF'S EXHIBIT No. 18.

"THE CALIFORNIA OREGON POWER COMPANY.

Medford, Oregon, July 2, 1926.

"To the Voters of the City of Gold Hill:

"Our offer to purchase the properties of the City of Gold Hill which are useful for waterpower development will be voted on next Tuesday, July 6th. I think it is of interest to the citizens of Gold Hill to know that if our offer is accepted we will continue the engineering investigations which have been commenced, and upon completion thereof will begin construction work upon the plant.

"The cost of this plant will be in the neighborhood of three-quarters of a million dollars, and the necessary funds are available to us.

"It is our intention to complete the engineering work at the earliest possible date, and the construction of the plant will be carried on during the summer season of 1927.

"Yours very truly,

"PAUL B. McKEE,

"Vice President & General Manager."

On recross-examination, the witness stated that without the proposed stand-by plant the company had been "just getting along"; that the efficiency of the Gold Ray plant could not be increased very

(Testimony of John C. Boyle.)

greatly—probably five per cent; that it would not be possible to get an increase of approximately forty per cent; that on account of the railroad fill for the Southern Pacific track, the dam could not be elevated very materially, if at all.

TESTIMONY OF JOHN C. BOYLE, FOR PLAINTIFF.

JOHN C. BOYLE, witness for the plaintiff.

(Examined by Mr. REAMES.)

He testified that he was 43 years of age; lived in Medford; was a civil engineer; Assistant General Manager of the plaintiff; been in that line of business for twenty-one years, and with plaintiff since its organization in 1920; a graduate engineer of the University of California. His qualifications were admitted.

He first saw the shattered area as shown on Plaintiff's Exhibit 2 the day following the explosion; was with Mr. J. C. Thompson.

The Court ruled that the witness should not go into the conversation with C. W. Martin, in charge of the dynamiting. The conversation was referred to in the testimony of Mr. Thompson.

The witness heard the testimony of Mr. Muirhead, Vice-President and Treasurer of the Cement Company, and in charge of the operation of the cement plant. He stated that he heard the description given by Mr. Muirhead of the kind of plant he [137—45] intended to install for the defendant Cement Company that he was acquainted

(Testimony of John C. Boyle.)

with that type of plant. This referred to the proposed electrical plant to furnish power for the cement mill. He testified that he had to do with the operation and installation of such plants; that we (meaning plaintiff company), had five similar plants in operation on its system under his charge.

He explained that this type of electric plant operates automatically. That is, that the amount of load delivered at the end of the line, or at the motors in the cement mill, is automatically taken care of by the automatic feature of the electric plant, allowing sufficient water to run through the turbines to pick up or drop the amount of load necessary to be delivered; that by the term "load" he meant the amount of energy required to run the motors, lights and different electrical installations which are installed at the delivery end of the distribution lines.

That the amount of electricity required at the cement mill from moment to moment, or hour to hour, during the operation thereof, is determined by the number of motors and other appliances that are put in service, or taken out of service at any time of the day. That is the amount of power required at the cement mill is suddenly and greatly increased, this is supplied automatically; the electric plant would automatically pick up the amount of water required to generate the load—the energy for the load that is picked up. That in the operation of the cement mill the load would be changed by a man disconnecting or connecting his motor, or it could be changed by the different load conditions

(Testimony of John C. Boyle.)

on the motor itself. That assuming that a certain amount of electricity is being used at the cement mill and more was suddenly turned on at the cement mill, the power would be drawn from the distribution line running to the cement mill. The amount of power plus [138—46] loss in transmission, and in the line added to it, would be the amount of power which the electric plant would have to pick up. The sudden turning on of that power would automatically increase the quantity of water necessary to pick up the additional load. He explained that there is a set of gates that are operated by a governor which is electrically controlled. These gates open and close on the turbine itself, allowing the required amount of water to go through to generate the load as indicated by the delivery at the end of the distribution line. These gates are operated automatically; that if there is no load on the cement mill, there would be no water flowing through the electric plant. As the load is picked up at the electric plant, the amount of water required to produce that load is drawn from the canal and through the canal up to the full capacity of the electric plant, if the load requires it. That when the cement mill draws no current at all, the water is automatically shut off at the electric plant wheel; that the effect which this has on the water in the canal and on the water in the forebay above the canal is that the water will seek its own level, and build up to the spillway level, above the spillway level until the quantity of water flowing in the

(Testimony of John C. Boyle.)

river can discharge into the spillway, or be forced back into the channel of the river above the intake gate.

He testified that he heard the testimony given on the previous day by Mr. Muirhead, in which Mr. Muirhead pointed out upon the exhibit the elevation of two spillways in the canal. Asked if he remembered the elevation of these spillways, he answered that the elevation is shown on Plaintiff's Exhibits 6 and 7. The witness referred to page 3 of Plaintiff's Exhibit 6. The place where the overflow was marked by the letter "F" by Mr. Muirhead, which exhibit showed that the top [139—47] of the spillway was to be raised to an elevation of 1073.75. The witness testified that the contemplated elevation of the spillway on the canal is shown by the exhibit as 1073.75. That the exhibit does not show a contemplated elevation at the letter "G" on the same exhibit. That if the current should be suddenly shut off at the cement mill, and the gates at the electric plant thereby suddenly closed, then the elevation of the water at this spillway would rise to 1073.75 (the spillway just described by the witness). That this would result in the surface of the water above the intake canal—the gates to the canal—seeking the same level above 1078.75. The witness referred to Plaintiff's Exhibit 13, which is a new map filed by the Cement Company with the State Engineer, and testified that the same shows the new concrete diversion dam elevation to be 1073.0. That this is .75 of a foot

(Testimony of John C. Boyle.)

below the elevation of the spillway shown at page 3 of Plaintiff's Exhibit 6. That these are the only elevations shown on this wing-dam which would be the spillway elevation. That there could be no drawing of water in the canal below the overflow gate shown on page 3 of the exhibit; that there would be no water passing below that point when the plant is not in operation. That the flow of the water between the spillway and the plant would be stationary at the time the plant is shut down.

PLAINTIFF'S EXHIBIT No. 2.

The witness took Plaintiff's Exhibit 2 and testified that the reef shown thereon extends across the river from the west [140—48] side along the section marked "A–B" to nearly the center of the river; thence it extends southerly along the section marked "B–C," this section being near the center of the river; it then extends easterly to the east shore of the river along the section marked "C–C." That the effect of this reef has upon the division of the waters of the stream between plaintiff's lands and those of the defendants is this:

It retards the flow of the river above the reef, the water flowing more rapidly from the down stream side of it. The division of the water is approximately one-third through the reef shown as A–B, one-third from east to west over section B–C and one-third over section shown as C–C. That the reef marked "A–B" runs through the head of the shattered area. That at the time he looked

(Testimony of John C. Boyle.)

the premises over, immediately following the explosion of the dynamite, he did this with reference to the effect that this work might have upon the flow of the stream, and the division of the water between the parties hereto, if the rock shattered by the explosion should be removed from the shattered area.

His attention was called to the testimony of Mr. Muirhead, and to Mr. Muirhead's intention of having the shattered rock removed and the sides of the blasted area leveled up and smoothed, and he said that if the area described by Mr. Muirhead is excavated to completion, the effect would be that all of the water from the river could be taken to the west side and used through the proposed power canal. That it would be taken through the power plant as the load became sufficient to require that quantity of water; that the channel to be so completed, as described by [141—49] Mr. Muirhead, would have sufficient discharge area to permit the discharge of 1347 second-feet of water at a water surface elevation of 1069, 1068 or 1067, whatever surface elevation it was there desired to draw the water down to in order to produce the power required at the cement mill; this result, of course, to be contingent upon the completion of the intake gates of the canal and the excavation of the canal, as shown upon Plaintiff's Exhibits 6 and 7. That in this he was including the widening and deepening of the canal as had been testified to, in order to make the full use of the 1347 second-feet. That when

(Testimony of John C. Boyle.)

this should be done the following would be the effect of the water upon plaintiff's Lots 1 and 2, namely:

The maximum amount of power could be obtained from the proposed power-house when the water surface elevation is maintained so no water is running over C–C, as shown on Plaintiff's Exhibit 2.

Asked what effect would this have upon the thread of the stream, what change if any would thereby be made from the same as it is now shown on Plaintiff's Exhibit 2, he answered:

That when there would be no water flowing over section marked "C–C," the thread of the stream would be moved westerly at section C–C to the center of the forebay or intake of the power canal. Asked how much approximately the thread of the stream would be fluctuated by these uses of the water according to the demands of the cement mill, he answered: That the thread of the stream would be moved to the center line of the forebay or intake canal opposite C–C, or it could not be moved at all, according to the load required at the cement mill, and the amount of water permitted to flow over section C–C. That the thread of the stream as indicated on said Exhibit 2 would be fluctuated back and forth, according to the load from [142—50] time to time as utilized at the cement mill. That the greatest distance that the thread of the stream would thereby be changed, moving westward from its present location, would be one hun-

(Testimony of John C. Boyle.)

dred to one hundred fifty feet, opposite the lower end of Lot 1, between the south end of Lot 1 and section C–C.

Asked what would happen if the varying quantity of electricity that would be required, from time to time with reference to the amount of water that would be left on plaintiff's Lot 1, during the fluctuating operations; whether there would be places that would be entirely without water above the line C–C and the condition below that line.

He answered: That above section C–C he doubted if any operations would take all of the water out of the pond, which might be called a "forebay" to the intake gates; that the river bottom there is considerably lower than the water surface; that at section C–C, which controls the flow of the water on the east side of the river, there would be no water flowing, and so below or down stream from section C–C, the river would be dry at times, and having water flowing on it at times, depending upon the operation of the cement mill. That during such conditions there would be water flowing over the spillway below C–C; that if the water surface is maintained below section C–C at the spillway elevation, Lot 1 would be dry as all of the water would be flowing through the power canal through the power plant.

Asked as to the purpose of such intake gates at the head of the canal, the witness said that there were two principal purposes: one to protect the canal and power-house from excessive [143—51]

(Testimony of John C. Boyle.)

stream flow, and the other to shut off the water in the canal in case of emergency, such as breaks in the canal, or work to be done at the power plant itself. That, as a matter of plant operation, it is not practical to use headgates to control the quantity of water that is put through the turbines, because the water level maintained in the canal is determined by the amount of power developed at the plant. This automatically takes care of itself. Then when the gates are closed the water finds its way out at the lowest point, which would be the spillway elevation, and the elevation at section C–C.

That if the shattered area should not be removed but left as it is, and there is just a natural flow of the stream, then under normal conditions two-thirds of the water would flow to the west side below and west of A–B and B–C without excavating in the reef.

THE CITY'S DECREED RIGHT OF 220 SECOND-FEET AND THE McCLURE DECREED RIGHT OF 75 SECOND-FEET.

The witness' attention was called to the city's claim to 220 second-feet, adjudicated to it, plus the 75 second-feet adjudicated as the McClure right; which latter right is on the plaintiff's side of the river.

The witness was asked that if, assuming that the defendant city desired to use the total of these two rights, to wit: 295 second-feet at the defendants' proposed plant, whether or not this

(Testimony of John C. Boyle.)

quantity of water could be taken into the plant, without the removal of any of the shattered area; that is, whether water flowing in a state of nature would find its way down into the head of the defendant's canal. [144—52]

The witness answered: Yes, that even with extreme low water in the river, the defendants could still get the said amount of 295 second-feet without making the excavation of the shattered area, that is, the removal of the rock shattered by the explosion.

SHEET 2 OF PLAINTIFF'S EXHIBIT 6 WITH REFERENCE TO THE REEF MARKED "C–C."

The witness was asked to take Plaintiff's Exhibit 6, sheet 2 thereof, and state what engineering stations were shown on that page, which corresponded to the reef C–C, and answered:

The stations shown on Plaintiff's Exhibit 6, sheet 2, and designated by the letter "K" run from Station 20 plus 20 to Station 21 plus 15, or thereabouts. That the heavy line running through those stations indicated the profile of the river bottom at that section. That according to this profile (on sheet 2 of Plaintiff's Exhibit 6), the lowest point shown is about 68.2, that is, an elevation of 1068.2. That the highest point between these stations just given is elevation 1071. The highest point on this section C–C may go clear out to beyond the bank of the stream.

(Testimony of John C. Boyle)

The witness was then asked when the river by the operation of the cement mill, as before described, should be drawn down so that no water would pass over the reef at the lowest point, 1068, what effect would that have upon the quantity of water at Lots 1 and 2, and the thread of the stream. He began his answer and the Court interrupted that he had answered that question, stating that he had already answered that as to the thread of [145—53] the stream, and the amount of water that will be below the reef: That there would be none, and that the thread of the stream would move over westerly for a hundred fifty feet.

The Court asked if that were not correct, and plaintiff's counsel replied that he thought that was all right,—that he was approaching another matter and tying it in. The question was then read to the witness, and he answered that there would not be any water flowing in the river channel flowing down stream from section C–C; neither would there be any water on section 1 (Lot 1), if all the water were taken through the power canal. Asked what the stream flow at any particular time would have to do with the question,—he answered that the stream flow from a minimum up to 1347 second-feet would be entirely under the control of the cement company's power plant, and the most power could be generated from the stream at any time from minimum up to 1347 second-feet when there would be no water flowing over section C–C. The witness stated that at any time when the flow in

(Testimony of John C. Boyle.)

the stream was less than 1340 second-feet, the greatest amount of power could be made at the cement company's plant by taking all of the water from section C–C.

That as to whether or not the Cement Company would lose power in proportion to the amount of water that was allowed to pass over the reef C–C, he said that at any time when the water surface elevation got above the controlling elevation on C–C, there would naturally be a loss of water at the cement mill. That there could be a loss of water up to the maximum capacity of the cement plant; that the amount of water might range from nothing up to a full discharge of the river at the spillway. That in the ordinary operation of the cement plant, the usual thing to do would be to draw the water from plaintiff's property whenever the flow was less than 1340 second-feet; that naturally [146—54] if the power is required by the Cement Company's use, it would be economical and proper in the operation of the plant to draw all of the water—get all of the water available. Speaking of the economical operation of the cement plant, he stated that it would be economical to draw the surface elevation below 1068, if the demand of the plant was more than could be generated under normal flow of the river. That by that, he meant that it is possible to use a certain amount of water that is in the forebay, and above the upper reef as pondage, and increase the river discharge above

(Testimony of John C. Boyle.)

what would be flowing in the river, in order to carry the peak load on the plant.

That assuming that there was a flow of 5, 6, or 700 second-feet in the river, that the pondage then on plaintiff's property would enable the cement plant to run at its peak requirements for a short period of time by drawing a greater quantity of water than the normal flow at the time. Asked how long it would take to thus draw the water down, he said that, of course, would depend upon the demand of the plant; that for example: If the river flow was 750 second-feet, the river discharge could be increased—the discharge in the canal to the power-house could be increased, to 2,000 second-feet by drawing the surface down two feet for a period of two or three hours; but that as soon as the pondage should be used, the output of the plant would necessarily be controlled by the 750 second-feet, and as the load on the plant dropped, the pondage would again build up.

He stated that with the elevation at 1068 at the reef that under the defendant's plan of operation, the quantity of water would be the controlling factor. Because this is a low head development and the difference in elevation of one or two or three feet is not the controlling factor in the power output of the plant. [147—55]

THE TWO HUNDRED NINETY-FIVE SECOND-FEET.

He said that with a water surface elevation of 69 and a 23-foot effective head at the power-house,

(Testimony of John C. Boyle.)

the plant would make 475 kilowatts. That the requirements of the Cement Company depend entirely upon its operation and the amount of power taken by it from plaintiff company for the Cement Company's purposes varies during different times of the day, and different times of the month and year, up to a maximum demand in 1930 of 1312 kilowatts. He stated that the 220 second-feet, at a surface water elevation of 69, and an effective head at the power-house of 23 feet, would give 350 kilowatts. He stated that assuming the same conditions in the use of the 220 second-feet as were assumed in the use of the full 295 second-feet, with a surface elevation of 69, and an effective head of 23 feet, 350 kilowatts would be produced at the proposed plant. (Tr. 132.)

STAND-BYS. (Tr. 134.)

The witness stated that the plaintiff had seven plants that were operating as stand-by plants, as a part of its property, and they are connected with five sawmill plants at the present time for stand-by service. That the five sawmill plants are not the only steam plants which plaintiff has as stand-by plants, but the plaintiff is operating one steam stand-by plant which is at Coos Bay.

He stated that the fundamental purpose of a stand-by plant is to pick up the distribution load of a community in which it is located and to regulate the voltage in which it is located for proper service to a customer. That the [148—56] plaintiff requires the property in question for this pur-

(Testimony of John C. Boyle.)

pose, and this is the purpose for which the plaintiff acquired its property involved herein. That such property is useful for carrying out the plaintiff's business in the community in which the property is situated.

That the witness does not think it practicable to use the Gold Ray plant for stand-by purposes; that he has made a study of the Gold Ray situation, and the controlling features of the plant are, first: That if the water-level is raised any higher than the water-level at the present time, it will overflow considerable portion of orchard land around the reservoir; it will encroach upon the Southern Pacific right-of-way, and the present type of structure will not permit any greater height, and this present capacity is fifteen hundred kilowatts, under its present stream flow.

Cross-examination by Mr. KOLLOCK.

The location of the stand-by plants are as follows: One at Gold Hill (Gold Ray), two in the city limits of Klamath Falls, one at Keno, just a short distance from Klamath Falls, one at Shasta River, close to the town of Yreka, one at Winchester, close to the town of Roseburg, and one at North Bend on Coos Bay. That the old original plants were built for service for the particular communities. They afterwards became interconnected on an interconnected system for stand-by service. That the plants were originally constructed for serving the local communities, [149—57] and for that pur-

(Testimony of John C. Boyle.)

pose they would be considered stand-by plants, and still are, after having been connected up.

He testified that if a plant serves a local community, it is a stand-by for that community. That the Gold Ray plant was built before thw witness' connection with the plaintiff. That prior to his employ by the plaintiff he was in the employ of the predecessors in interest of the plaintiff, California-Oregon Power Company. That the name of the plaintiff is The California Oregon Power Company. That it is to all intents and purposes the same corporation following a reorganization.

That of the Klamath plants two were originally built without reference to the entire system, one of which is still used by the plaintiff as a stand-by plant, but was originally a stand-by plant serving the community without connection with the other system. That such stand-by plants run continuously and are in continuous service. They regulate the voltage in case of line interruption. That they are in continuous operation except to regulate voltage in case of line interruption. They serve an emergency and are operated continuously irrespective of emergencies.

He stated that it would be impractical to increase the Gold Ray plant for reasons stated, but admitted that the company had the power to condemn, but stated that damages would perhaps be pretty high, and that it was impractical from the standpoint of expense. That the right of way of the Southern Pacific abutts upon the dam at Gold

(Testimony of John C. Boyle.)

Ray, or within a few feet thereof about ten feet. That the dam itself is an old timber crib, which could not be rebuilt to that height. That below that point the plaintiff has investigated the entire territory [150—58] with reference to building an entirely new structure below the Gold Ray dam to the same height as Gold Ray dam. That no plans have been made for increasing the height of it because of the expense. That he has been over the site several times personally, and surveys and measurements have been made by the plaintiff's employees, Mr. Olsen and Mr. Warren, under the direction of the witness.

That the measurements of water at the various points to which the witness has referred were based upon Mr. Olsen's investigation and the testimony of Mr. Muirhead.

His attention was called to the fact that he had testified about the continuous reef across the river, commencing on the west bank following the line marked "A-B," running more or less directly across the stream, then the line north and south, following practically the main direction of the river itself; then on another line C-C. He was asked if there were not various openings in that so-called reef, and answered affirmatively; that one-third of the total flows on the line that passes through the so-called reef marked "A-B," as the stream now exists. That approximately two-thirds passes in the channel across the line marked "B-C" on plaintiff's map from east to west. He did not know the depth

(Testimony of John C. Boyle.)

of the channel, except from the testimony. (Meaning that he had not personally made any measurements as to the depth.) He referred to the testimony of Mr. Muirhead, Mr. Olsen and to the exhibits. That Mr. Muirhead testified to the amount of water flowing in the various channels in his previous examination.

He was asked if it was not a fact that the reef did not furnish much obstruction to the flow of the river, but answered that it did; that it holds the river at a higher elevation at the openings than the water is below, but allows [151—59] two-thirds of the river to pass over, through what is called the reef.

He testified that the water was shallower on the line B-C than east of it or west of it. That he obtained this information from the cross-section that was taken. That there is a cross-section B-C, shown upon one of the drawings submitted to the State Engineer. He stated that it is shown on sheet 2, filed with the State Engineer April 3d, 1931, and the cross-section is shown as a solid section between plaintiff's stations 20 plus 20 and Station 22, which follows the line very closely, indicated on plaintiff's exhibit as line B-C—practically the same section as B-C. The witness was referring to what was then marked as

DEFENDANT'S EXHIBIT "A" FOR IDENTIFICATION. (Tr. 143.)

The witness stated that his answer had been given with reference to that exhibit. The witness testified that when the river should be drawn down below 1069 or 1068, there would be no water passing over the reef marked "C–C." That he drew this conclusion from Plaintiff's Exhibit 6, cross-section to which he had referred, and solely from that. That, according to the date on the exhibit, the cross-section was made in 1926. That his statement that the reef would thus be dry is drawn from the profile made in 1926, and also from present conditions, having been there and looked at the river channel on several different occasions. That he had not gone across to the line C-C, and made any determination of the depths at various points, and had observed the reef on line C-C only from the shore. No water would pass over the reef under the conditions described, because the reef is itself higher than 1068. That the result of so drawing [152—60] down the water, would be that the thread of the stream would be moved over from one hundred to one hundred fifty feet to the west. That if, as a matter of fact, at the point in controversy, at an elevation of 1068, there were a considerable amount of water flowing over the reef, and the river channel below C–C was completely covered with water, the thread of the stream would remain unchanged, in his opinion.

(Testimony of John C. Boyle.)

He was then asked:

"Q. And if by reason of the fact that some water was flowing over, the flow line of the bank were moved somewhat, but not so much to the west of where it is as to be entirely dry, the thread of the stream would be moved proportionately less?"

He answered: "Yes, sir." (Tr. 145.)

He defined the thread of the stream as a line established in the center of the stream equally distant from all points on the bank of the stream perpendicular to the thread of the stream at extreme low water. That by the bank he meant the point of contact of the stream and the bank at low water.

He was then asked:

"Q. The surface of the water is what is involved; off course would not measure to a point higher up than the water was, and by the bank you mean the point of contact between the water and the land. Isn't that true? A. Yes.

Q. The thread of the stream is not dependent at all upon the volume of the water that flows on either side, providing the condition of the surface remains continuous.

Q. That is correct." (Tr. 146.) [153—61]

He stated that the plans submitted in evidence showing the proposed construction of the electric plant by the defendants give all of the details necessary for properly estimating the cost of the plant. It does not give the details of the electrical features. That is of the electrical operation of the headgates, as to the automatic control of the gates at the tur-

bines, they show that the gates will be operated automatically. They do not show or describe the method, because the gates are there and they operate only in a certain way with that type unit; that there is not a great deal of difference in the unit types, that would come within the general description furnished by the State Engineer by the maps of the defendant Cement Company. There is some detailed difference but it is not material. That he knows the exact method of gate control there, and as disclosed by the filings made in the State Engineer's office.

That through the demands of the peak load upon the electric plant, the flow would—in such an automatic plant—increase to a point where it would take care of the load. That there is no automatic limit to the amount of water which would be drawn through the gates; that this depends upon the demand of load; that the load is the demand. That there is no automatic limit upon the amount of water drawn through the gates, except the demand of the load. That you cannot operate the plant automatically and still limit its capacity. That the plant cannot be so regulated that not more than a certain amount of water will be drawn from the stream through the plant under varying load conditions. That you might limit the maximum point or the maximum amount you could take from the plant but below that maximum you would have no control [154—62] over it. But that you could so set it that the maximum would

(Testimony of John C. Boyle.)

not be passed. So that it is a matter of operation by the company of this machinery. That you could set the machinery so that it should not so operate as to take more than a certain amount of water through it. But that you could not so set the machinery that a given head will be maintained at the gates with a given elevation so as not automatically to draw the head down below a certain point. That you cannot set this machinery so automatically the water would not be drawn down below 1069. That it would depend upon the load that you are carrying. The water elevation would depend entirely upon the load you were carrying up to a limit, if you want to put a limit on it, but that that limit cannot be put at a point which will maintain that elevation at the headgates. It is an engineering impossibility. The witness stated that he had done both electrical and civil engineering. That his degree was in civil engineering only.

He stated that by lowering the water at the headgates of the defendant's canal, all of the water could be drawn up to a discharge of 1347 second-feet. That if, at the time, there were only 1,000 second-feet of water flowing in the river, the operation would draw all of the water flowing on either side of the west bank above the point into the canal.

He was asked and answered:

"Q. Suppose there were only a thousand second-feet of water flowing through the river, then at this point where the narrows go through, and approxi-

(Testimony of John C. Boyle.)

mately the ultimate proposed point, eastern extremity of the proposed wing-dam, you could draw all the water flowing on either side, on the west bank above the point, into the canal? A. Yes." [155—63]

Asked how much it would have been necessary to lower the bottom of the canal at the headgates to accomplish that purpose, he stated it would be necessary to lower the bottom the amount shown on the blue-prints of four to four and one-half feet, three feet, as shown on one of the exhibits; then if you lowered the water elevation, it would draw all of the water of the river from there on down to the power-house. That the water immediately east of the eastern extremity of the proposed wing-dam is more or less still, or in a pond considerable deeper than the water below the reef on one side. Asked if it is not, as a matter of fact, deeper than the bottom of the channel through the narrows, he answered: That does not affect the water surface.

He stated that it was considerably deeper than the water at the bottom of the canal through the narrows; that he did not know how much deeper. He believes it is shown on the lower cross-section taken as A–B. That on Plaintiff's Exhibit 11 the depth is shown as approximately nine feet immediately east of the shattered area.

He stated that in his opinion if the water at the point of diversion should not be reduced below a surface elevation of 1069 that the east channel would

(Testimony of John C. Boyle.)

not be dry at the point marked reef "C–C." He thought the water would flow over most of the reef under those conditions. As to whether or not the thread of the stream would move to the west, he stated that it would only move in the amount of the lowering of the water below its water-level proportionate to the horizontal recession of the water from the shore rather than the depth of the water.

He was asked and answered:

"Q. Do you think there would be any change in the thread of the stream at that point under any circumstances?

A. That is above section C–C? [156—64]

Q. Below Section C–C, right at the end of it; part above, and part below; passes apparently along a long island there.

A. I think above Section C–C the thread would remain as it is.

Q. Irrespective of whether it passed in the water or on the land; and from C–C if and only if the reef were dry would the thread of the stream move to the west? A. Yes." [157—65]

JOHN BOYLE, redirect examination.

(Questions by Mr. REAMES.)

The witness testified that with a water surface elevation of 1069 at the intake gates of the canal, the thread of the stream below the reef marked "CC" would be transferred to the west as you proceeded nearer the canal entrance.

He testified that it is not practical to control the

(Testimony of John C. Boyle.)

amount of water that goes into the electric plant so that a certain amount only would be used in the manner suggested in the previous cross-examination. (That is by regulation of the gates at the canal entrance.) That it is not commonly done in operations as such would be had at a plant like a cement works. He stated that when he had before testified as to the type of plant that was to be used by the cement company as the same is shown upon the plans of the defendant company filed with State Engineer, he also used the information gathered by him from the description of the plant given by Mr. Muirhead when he had been on the stand the day previous. He stated that this had particular reference to the automatic operation of the plant.

He testified that in giving his foregoing evidence about the division of the water of the river at the reef and referred therein to the testimony of Mr. Muirhead in the former trial he was referring to the former trial of this particular case,—that is,—the first trial thereof; that he referred to that portion of that testimony where Mr. Muirhead had testified that he and Mr. Allen had made accurate measurements of the discharges through the various three sections of the reef.

At this point plaintiff's counsel asked to be copied into the evidence the testimony of Mr. Muirhead so referred to in the examination of the witness from pages 64 and 65 of the transcript of the former testimony which was marked lightly for the purpose with a red cross and check from "At

(Testimony of John C. Boyle.)

[158—66] the point marked 'B' by Mr. Olsen?" down to the interruption near the bottom of the page, ending with the word "therefore it is,—" Objection was made, and the following occurred:

"Mr. KOLLOCK.—I object to the introduction in evidence of any part. I understand Your Honor to rule the entire record of testimony is in for all purposes, which means the right of counsel to refer to it in any way; but I don't see why any part should be introduced formally into evidence and copied into the testimony in this case.

Mr. REAMES.—This is simply that the record of this testimony will be complete, and it will save the Court going back and forth, and while it was all considered in, I am calling particular attention to these parts.

COURT.—You can call the Court's attention to it in that way, by the introduction of all the record. The Court will not order it copied into the record. The whole examination is in evidence, as I understand, for all purposes. If you desire to call the Court's attention to any particular part, the Court will be glad to look at it.

Mr. REAMES.—These are very short parts, and I thought I should read them in.

(Inasmuch as the Court did not rule out the evidence offered, but only did not permit it to be copied into the record because it was already embodied in the transcript which had been received in evidence, the portion so offered is, by agreement of counsel, here set out as follows:) [159—67]

(Testimony of John C. Boyle.)

"Q. Is that the point marked 'B' by Mr. Olsen?

A. That could be the narrows,—this point shown as 'B' by Mr. Olsen; and it carries a good portion, almost fifty per cent of the flow of the stream, at the present time. However, if we are to utilize this to its maximum development, under such water as we can get coming to here, this opening will not pass enough water to give us any development of any consequence. So we would need a larger opening.

COURT.—You say passes fifty per cent of the stream now?

A. I can tell you exactly what it passes, or very close. On the day we took these measurements it was passing four hundred fifty-five second-feet; 455.8 second-feet; the total flow of the river that day being 1086.9.

COURT.—About half of the stream.

A. Those stream measurements were not taken at the Government gauge at Tolo, they were taken right at the site, by as accurate measurements as we could devise, and at the present time there is quite an opening there.

Q. Where?

A. At this point marked '2'; there is an opening there that is permitting 333 second-feet of water to flow through.

Q. Flow through which way? [160—68]

A. Flowing to the west bank at this point on the day that these measurements were taken; total reading was 1086.9 on the river, and we were getting 333

(Testimony of John C. Boyle.)

second-feet, with a small variation, through that point. Now our contemplated work plans on extending this dam up here, solidly up here, with no openings through here, across that stretch up to here; therefore this 333 second-feet that is now flowing through there would be stopped from flowing through there, and would pass on down here. Therefore it is—

Mr. Boyle's attention was called to the fact that he testified concerning his connection with the predecessors in interest of the plaintiff and his having said that he had been many years with its predecessors. His attention was called to the fact that the Gold Ray Realty Company was the predecessor of the present California Oregon Power Company and he was asked if he had ever been in the employ of the Gold Ray Realty Company to which he replied that he had not. He was asked if he were with the Siskiyou Light and Power Company and the question was objected to as leading and the Court sustained the objection and he was then asked: "What of their predecessors did you work for?" and answered that he started to work for the Siskiyou Electric Power and Light Company, afterwards taken over by the California Oregon Power Company. (Tr. 155.)

Recross-examination by Mr. KOLLOCK.

He testified that he was acquainted with the defendant cement company's power requirements; that it was not a fact that such a user was a very

(Testimony of John C. Boyle.)

constant user of power with little variation during the twenty-four hours; that the defendant [161]—69] cement company is not in constant operation as compared with other loads which the plaintiff has; that the Cement Company's demands may vary from nothing to 1312 kilowatts during the season. He testified that it operates on a twenty-four hour basis, if operating at all; that during that period of operation its load is uniform, but the load factor, compared with other loads, is comparatively small, meaning that the load factor is the ratio of the maximum demand to the average demand during a given period of time; and that is, the average demand over a period of a month or two months. But that during any one twenty-four hours of operation the load is very constant, while during thirty days in the month on which the load is usually figured, and the maximum demand being taken during the month, it is not in constant operation. (Word "not" omitted in transcribing.)

He testified that during any twenty-four hours the load is comparatively constant. Asked if there were any more constant load on the plaintiff's system, he testified that there was,—namely, the dry-kiln in the lumber industry; that it has a very high load factor during the entire month; that that is not the only one that during any twenty-four hours will have a more constant demand for power than will a cement plant. Asked for others he replied, in motor loads like the ice plant, the flour mill, and that type of industry.

(Testimony of John C. Boyle.)

The witness testified that he was not familiar with the work that had been done by the defendants at or near the shattered area and prior to the explosion of dynamite referred to in the complaint. He testified that he did not know of any work done at that point since the explosion. He stated that he doubted whether the blasting that had been done had now changed the thread of the stream, in fact that he knew that it had not changed the thread. He was asked what effect on the thread of the stream, if any, would be had simply by removing [162—70] the shattered rock without changing the headgates or the canal or lowering it or widening it and testified that the lowering would depend on whether they took any water through the present canal and upon the amount that goes through the present wing-dam,—that is, the end of the proposed wing-dam. He stated that the amount of the change would depend upon the quantity of water taken. He again testified that he did not think the mere shattering of the rock without its removal would change the thread of the stream; that he does not think the shattering of the rock alone has had any effect upon the reef marked "CC." He testified that he thought that the amount of water that flows through the channel where the shattered rock remains and section B–C is sufficient to supply what the defendants take through their canal and that there hasn't been any difference in the water surface elevation to speak of and no difference,—no change in the river dis-

(Testimony of John C. Boyle.)

charge; that the discharge through defendant's canal depends entirely on the water surface and the bottom of the canal excavated. On a low head plant the quantity of water is the determining factor on power output of the plant.

Asked what two elements entered into any power development he answered quantity of water and distance through which it is dropped, which is head; that the quantity of power developed depends upon the head multiplied by the volume of water, but that you can reduce your head on these small developments, obtain more water and get a consequently greater output of power although it still remains true that the head multiplied by the volume of water determines the power development.

The witness said that in his testimony he had assumed an effective head in the defendant's plant of twenty-three [163—71] feet, depending upon the quantity of water; that if the quantity of water is increased so that,—in order to get the discharge through the canal the water surface had dropped, the effective head might be somewhat lower than twenty-three feet to take care of the friction losses at the canal gates; that under normal conditions of low water in the river the witness thought twenty-three feet would be a reasonable head on which to figure this development,—that is, effective head. He testified that the defendant cement company's monthly power bills for power purchased from the plaintiff varied from $251.60 a month to $5,696.08 during the year 1930; that the total cost of the

(Testimony of John C. Boyle.)

power used at the cement plant was for that year, $33,948.48; that he did not have the figures showing the cost at defendant cement company's quarry.

Redirect Examination by Mr. REAMES. (Tr. 163.)

The witness stated that the cement company operated about seven months per year; that the plant is operated when the market is best, which is during the summer months; that there would be more water available in the river during the spring time; that the cement manufacture would probably start during that time and extend through the summer; that according to the records kept by the plaintiff the maximum operations of the defendant cement company were during March, April, May and June; that July is a low month,—August, September and October are high months. That the river will begin to rise in the month of December, depending upon fall rains; that it will continue to furnish [164—72] a greater supply of water up to about May or June. The witness said that some power could be developed with less than twenty-three feet head providing all the water is taken from the stream and the pondage above the intake gates utilized. The witness said that he was not present at any former trials between the parties hereto except the first trial of this case in Medford the year previous.

As to uniform loads, the witness testified that the mining dredge on Foot Creek has practically a uniform load and that it is a big consumer.

Plaintiff rests. (Tr. 165.)

TESTIMONY OF FLOYD W. ALLEN, FOR DEFENDANTS.

FLOYD W. ALLEN, a witness called for the defendants.

Direct Examination by Mr. KOLLOCK.

The witness testified that he is a civil engineer, has been practicing that profession since 1906 in the states of Washington, Montana, and Oregon and in Alaska; that he was not a graduate, but had three and one-half years education in the University of Washington and is a licensed civil engineer in Oregon; that he has been employed by the defendants City of Gold Hill and the Cement Company in connection with the proposed water-power development on Rogue River in the vicinity of Gold Hill; that he was first called in consultation in July, 1926. He talked with Mr. Muirhead who consulted him pertaining to the development of a power site on Rogue River and the witness advised a complete survey of the site; that these [165—73] surveys were made by Mr. White whom the witness later joined; that White is a civil engineer at Grants Pass. That from surveys and studies preliminary plan quite complete in detail and sufficiently elaborate for filing in the State Engineer's office were made. That plan had a certain outline of development which is covered thoroughly in the report to the defendants.

The dam contemplated was a concrete structure which would be termed a diversiion dam extending

(Testimony of Floyd W. Allen.)

from concrete headgates which had been previously constructed by predecessors of the defendant city extending northerly along the westerly line of the thread of the stream; that is, northerly over the,—here there was an interruption,—

The witness explained that all exhibits that are filed here from the State Engineer's office files were all maps. That for the purpose of explanation,—here the witness picked up Exhibit 7.

He was asked what the exhibit is and plaintiff's counsel objected that if he was about to ask his witness to describe the plans and specifications that were involved in the condemnation suit, it has nothing to do with this case at all. Counsel for the defendant explained that he was not asking about condemnation.

The witness stated that this is a complete copy of maps filed in the State Engineer's office in connection with the water filings in behalf of the City of Gold Hill on Rogue River on the site in question; that these were filed December 3, 1926.

The exhibit was marked Defendant's Exhibit "B," the same being Plaintiff's Exhibit 7. (Tr. 168.) [166—74]

The witness stated that the drawings were filed December 3d; amended July 3, 1928, and that these comprised Exhibit "B."

He explained that sheet 1 of the exhibit is identical with the original filing with the State Engineer; that prior to this date there had been constructed concrete headgates in the southerly portion of Lot

(Testimony of Floyd W. Allen.)

8, Section 15, Township 36 South of Range 3 West, marked "A" to "B."

Tracing the course of the proposed dam from that point he said "A" to "B" marked on the map is the headgates that were in prior to this date and are still in on this site. "B" to "C" is concerte diversion dam constructed prior to the date of this survey and the date of this filing. "C" to "D" is also partial diversion or wing-dam constructed prior to the date of this survey. From "D" to "E" is the proposed extension of the permanent concrete wing-wall or dam terminating on the rock island in the center of the stream, "E" to "F" is diversion dam extending from the island to the easterly bank of the Rogue River, and "F" to "G" is a wing-wall extending to the easterly bank and terminating in Lot 1, Section 15, Township 36 South of Range 3 West.

The following then occurred:

Mr. REAMES.—May I interrupt, to save time; you mean proposed?

A. Proposed.

Mr. REAMES.—Isn't constructed?

A. No.

Q. From what point was it then proposed to—

COURT.—He has explained that, from D on. The [167—75] Court has it. Now all this testimony so far *as* referred to Sheet 1 of this Defendant's Exhibit "B."

Q. Mr. Allen, you trace a line from the point marked "B."

A. No, I scratched this "B" out.

(Testimony of Floyd W. Allen.)

Q. What do you mark this point?

A. Nothing.

Q. Trace all the way through; from point indicated on the map as lying immediately north of the island upon which that proposed construction would terminate is a fine blue line tracing out to a point further up the river from that. Will you state what that indicates on the map. By the way, you prepared all these yourself, didn't you?

A. I did, yes. On December 31, 1926—no, July 9, 1928, the plan of development was changed, whereby the diversion dam was to be constructed, or proposed to be constructed to the west, immediately west of the thread of the stream, marked on the map H to I, and I to J. (Tr. 170.)

The witness stated "I" is on the main island on the largest of the islands, and "J" was upon a smaller island near the thread of the stream. It was proposed from "J" on that island in the thread of the stream, to construct a diversion dam approximately,—diversion dam to an old crib existing prior to 1926 and marked from "J" to "L." That this left a slight opening between "L" and "M," "M" being upon the main land on the easterly bank of the Rogue River. This plan was again necessarily altered at a later date you might say prior to the case in equity,—prior to that,—whereby the main wing-dam crossing the Rogue River was changed from the fourth island to the third island from the westerly banks. This was necessitated by the fact [168—76] that after an examination of

(Testimony of Floyd W. Allen.)

the island to the extreme west from the westerly shore that island had been destroyed by high waters preceding this plan of procedure; that island "J" was almost destroyed by the high waters of 1927; that then the terminal point was shifted to the island marked "N"; from that construction was started to close the gap between the island "N" and the old log crib existing prior to the flood of 1927, marked on the map from "N" to "L"; this work was stopped by injunction and suit in equity, so this plan was altered to partial closure, which contemplated building the wing-dam to the thread of the stream along the line "N" to "L" and extending only to the thread of the stream. The proposed construction is on the amended subsequent filing, certified copy of it. This is

PLAINTIFF'S EXHIBIT 13

shows to all practical intents the same wing-wall as shown on sheet 1 of Plaintiff's Exhibit 7 or Defendants' Exhibit "B" from station or from letters marked "B" to "H.", From "H" to "O" the plan of diversion wall was changed slightly to meet the main island as shown on the plat at "O." From "O" to "P" was a slight change throwing the proposed diversion dam a little further to the west than the previous map showed and from "P" to "N," which is in common with "N" on sheet 1 of Plaintiff's Exhibit "F." The proposed wing-dam is shown extending thereon from the island marked with "N" to point "Q," being approxi-

(Testimony of Floyd W. Allen.)

mately the center or thread of the stream. This is the maximum extension of the proposed diversion dam; the entire proposed wing-wall is entirely west of the thread of the stream. (Tr. 172.) [169—77]

Asked if he had any other map in relation to the proposed development the witness answered that he would like to give a quick explanation of all of the maps embodied in this record from the State Engineer's office which was permitted and he said:

Sheet No. 2 of Plaintiff's Exhibit 7, Defendants' Exhibit "B" is a profile of the construction of a concrete diversion wall as proposed in the fall of 1926. This profile extends from the present, the existing concrete headgates to an hundred feet towards the diversion wall northerly and easterly across the Rogue River and tending north on Lot one. Sheet 2–A is the plan of the wing-dam or diversion dam extending from the island, the easterly most island to the old Log Crib that was washed out in 1927.

The COURT said: "This portion was abandoned, of course?"

The witness answered this has been abandoned since that time. Sheet No. 3 is a map of that portion of the proposed development showing the existing canal from the headgates to the present power-house and extending southerly,—easterly to the proposed power-house upon the Rogue River. The map is divided into two sections, that portion in the upper right-hand corner joins with the por-

(Testimony of Floyd W. Allen.)

tion in the lower left-hand corner. He marked an X at the point of juncture and said: XX are points in common as shown upon this map. He said the water from the power-house discharged at a point on the map at the extreme right-hand side, which he marked with a "Y" as the point of discharge on Sheet No. 3. He said there is no change in this plan or map in the contemplated present development. That there is now existing on this old canal which was previously constructed several years ago a diversion dam forming an overflow spillway 160 feet in length, marked "ZZ" on [170—78] the map and 340 feet south from the headgates of the canal. This present diversion or overflow spillway is an elevation of 1068.33 and is to be raised to 1073.75. That there are at present the emergency spillway gates at a point 1950 feet south from the headgates of the canal and at the entrance to a flume to be constructed from the end of the canal to the power-house; that this is not a spillway or an overflow spillway, but is for the purpose of draining the canal in case of emergency. That sheet 4 is the contemplated cross-section of the entire canal from the headgate to the entrance of the flume, a total distance of 1950 feet; that these cross-sections are based upon originals,—the plan of work as shown upon these cross-sections are based upon original contemplated work whereby the river elevation would be maintained at an elevation of 1073.00. Since then the contemplated work and the inability to close the stream has necessitated a lower water surface at the point of diver-

(Testimony of Floyd W. Allen.)

sion to an elevation of 1069.00. This will necessitate the lowering of this,—lowering the cross-sectional area,—lowering the bottom of the proposed cut in this old canal from three feet at the headgates to 2.6 feet at the point of entrance to the flume. He explained that he meant to the point at the upper end of the canal. That the point of diversion he refers to would be opposite the upper end of the wing-wall, or opposite the point of the area blasted. That when he mentioned three feet below the cross-sectional area he meant three feet below that contemplated; that that would necessitate from three to four and a half and to five feet lower than the present condition of the canal.

That sheet 5 is a proposed cross-section of the flume extending from the end of the canal to the present power plant and thence on to the proposed power-house upon the banks of the Rogue. [171—79]

That this section would remain in all practical purposes the same as the original filed with the exception of the necessity of lowering the bottom of the flume to depths of two and a half feet to be able to maintain and pass through the given quantity of water which they had appropriated and at the elevation of 1069.00 at the point of diversion. He stated that sheet No. 6 is the power-house that is now in existence, with such repairs and modifications to place it in workable economical operation.

That sheet No. 7 is a general plan and elevation of the proposed power-house on the west bank of the river at the point of return of the waters diverted,

(Testimony of Floyd W. Allen.)

which contemplates two units of approximately a thousand kilowatts each, or with total theoretical horse-power of approximately three thousand. He said that the elevation of these waters would be considerably lower under average conditions but the overflow elevation,—the maximum elevation that the plant will be operated will remain substantially the same as that of the plan of 1926, with an operating condition prevailing around 1068 and a fraction feet at the power plant itself. That this necessitates fluctuating head at the power plant of approximately three feet on the forebay, with such fluctuation of the tail waters that are prevailing in the Rogue River at such time of diversion. The tail waters are subject to rise and fall and the quanfity of water in Rogue River proper.

He stated that the waters of the forebay will vary from '67.5 to an elevation of '72.00.

The witness said that the elevation of the water will be maintained at lowest elevation 1069.00 above the headgate. [172—80]

The witness was then shown what was afterwards marked

PLAINTIFF'S EXHIBIT "C"

and explained that this photograph is the concrete work referred to as marked on Plaintiff's Exhibit "R" to "S," the concrete extending higher than the balance of it in the lower right-hand corner being in common with point R, and the arrow pointing as the end of completed work, being the point halfway between R and S, and S being in common

(Testimony of Floyd W. Allen.)

with point N marked in the photograph as the end of the uncompleted dam. He explained that the following was also shown on the photograph:

To the north and east is a temporary splash board or wing-dam placed there by the City of Gold Hill for maintaining the level of the water in the west channel to divert it down there through a canal for power purposes. That he did not know whether it was there then, but that it was there in October, 1930.

The photograph was then introduced as Defendants' Exhibit "C." (Tr. 176.)

The witness was then shown

DEFENDANTS' EXHIBIT "D" (Tr. 176)

and stated that it is a photograph looking south or downwards towards the headgates or the entrance of the canal. He stated that he was unable to identify a piece of revetment work along the western bank and that it had no particular connection. [173—81]

Defendants' Exhibit "D" received in evidence. (Tr. 177.)

The witness testified that he made measurements of the water flowing in the various channels and profiles of the bottom of the river at various points as a part of his duty, together with investigations and measurements of water and survey profiles. That Mr. John White assisted the witness in making the water measurements. They made them in the following manner:

(Testimony of Floyd W. Allen.)

First carefully cross-sectioned the channel in question determining the depth and area of the section so measured; took the velocity of the water at as many points as reasonably to expect accuracy,—reasonable accuracy in such measurements,—from two to three, to as high as 75 measurements to a cross-section; used two instruments,—one Gurley Electric, which he said is the most common of all instruments for such purposes, and another known as K. & E. Mechanical type. He said the Gurley electrical instrument showed a range from a four to as high as 10 per cent in excess of the mechanical instrument which might be expected under the conditions. That they determined their basis upon the larger quantity that the Gurley instrument recorded as being more accurate, recognized the most accurate. He was asked to take a map and point out the channel so measured, and the method of arriving at the results. He took map marked Exhibit "E" for identification,—

DEFENDANTS' EXHIBIT "E" FOR IDENTIFICATION (Tr. 178),

DEFENDANTS EXHIBIT E

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(Testimony of Floyd W. Allen.)

and stated that the first measurement was made crossing the entire channel at the selected site approximately a thousand feet above the concrete pier existing at the [174—82] old log crib. This was measured in the manner previously described; that they went upstream so far in order to obtain as ideal a condition as practicable for the measurement of the entire stream without any division in the water. He marked the place on the map in red with a letter "A." He determined the entire flow of the river at that point on September 26th, 1930, was 1086.9. This is at from 10.10 A. M. to 2:45 P. M. The second measurement was made of what is commonly determined the narows, marked "B" in red upon the map and the determination of quantity of water made at this point was 455.8 second-feet. There were many small channels existing between an island immediately east of the narrows and the larger island in the center of the stream and they are marked C, D, E, F, and G. The total of this area or cross-section between the two islands is 332.9 second-feet. In this last-defined channel the water was flowing from the easterly channel to the westerly channel. This is marked by an arrow in red pointing to the direction of the flow that the stream has at that point.

He mentioned the points C, D, E, F, and G, and the east channel and the west channel, stating that through all of their testimony they referred to practically everything east of the thread of the stream as the east channel and west of the thread of the stream as west channel.

(Testimony of Floyd W. Allen.)

He stated that he made the measurement of the third section on the same day. On the 27th of September he measured C, D, E, and F, and G and also B. The measurement upstream was on the 26th. The conditions of the water were not exactly the same on the two days, but were corrected to the same common elevation so the readings would be in common. He stated that H is the [175—83] measurement of the east channel at the extreme lower end of the group of islands near the thread of the stream. The measurement at this point was 334.7 second-feet. On the same day there was a measurement taken between two of the islands and marked H-prime (H') which amounted to 23.8. This quantity of water was flowing from the west channel to the east channel. Measurement was taken between the westerly bank and the northerly-most island of a certain group and marked as "I" on the exhibit and this measurement was taken twice on September 28th, 1930. In the morning the total volume of water was 794.5 second-feet. This was before we opened, or practically opened to the best of our ability the temporary diversion dam to the south of the point in question and immediately north of the concrete headgates adjacent to the canal. All readings were corrected to conform to the average mean elevation of period of time that the original measurement was made on the 26th of September, which was 1069.91 feet at a point marked "Z" in blue on the exhibit. The west channel was measured again after opening of the dam,—our diversion dam below,—and found

(Testimony of Floyd W. Allen.)

to flow 867.4 second-feet under the same conditions as in the morning and stipulated change of the opening of the diversion dam below.

He testified that they are absolutely the same measurements given in the other case. He testified that he was familiar with the location of what is called the reef across the east channel and did not make measurements of the water at that point owing to the inability to accurately measure the water.

The determination of the quantity of water flowing at this point was,—he said,—based upon a section approximately a hundred feet south of that reef which had the entire flow over the reef plus the 23.8 second-feet [176—84] flowing from the west channel to the east channel. That this would make a total flow over the reef of 310.9 second-feet before the opening of the temporary diversion dam and a quantity of water of 238.0 second-feet after the opening of the temporary diversion dam. The witness testified that he made a contour of the river at the point which has been referred to as the reef indicated as "C–C" on Plaintiff's Exhibit 2; that there was included in his original plans shown on sheet 2 of Plaintiff's Exhibit 6, which is a copy of the records from the State Engineer's office and from a profile made in September, 1926, from a survey made by Mr. White; that the different projections on the profile were interpreted by himself and platted on the map by himself. He testified that the profile showed the lowest point in there to be 1068.0. Further questioned he said 1068 on

(Testimony of Floyd W. Allen.)

profile,—1 or 2 tenths. He was asked that if referring to the conditions existing in 1926 when the survey was made as to whether or not the lowering of the water to 1068 would leave the reef dry and answered: "lowering the water to 1068, if this was correct at that date, would leave the reef dry."

He testified that since that date he had had occasion to make a subsequent survey and cross-section at this point; he stated that he would doubt the accuracy of the rock reef even at the time of the survey, because interpreted or projected from a map of proposed contour; that was a preliminary survey with no intent of minute accuracy nor was it necessary for minute accuracy at that time.

He stated that Mr. White and himself and employees of the Cement Company made a survey on September 29, 1930, at a cross-section immediately above what is commonly termed the reef in this testimony. It was the [177—85] shallowest water that they could find up and down the stream in the immediate vicinity of this reef. He was then shown Defendants' Exhibit "F" for Identification (Tr. 184), and testified this is a cross-section or profile from a point on the center group of islands marked "R" on Defendants' Exhibit "E" out to "U," and "U" to "W." This cross-section of elevations were taken at every break at the highest and lowest depressions of that particular section extending across the east channel of the Rogue River at a point immediately above what is known as the reef. That this graph is based on actual surveys made by the witness and Mr. White on that

(Testimony of Floyd W. Allen.)

date. He stated that this cross-section entirely refers to elevation above sea-level; that each heavy line is a foot in elevation; that the lowest point in the entire section drops to an elevation of 1066.0 feet, which place on Exhibit "F" he marked with a letter "A." He marked 1066 with a letter "A," 1066.4 with a letter "B," and 1066.2 with a letter "C" and stated there is an island protruding above the water at points marked "D" and "E." That "D" is approximately a foot above the high water or the water at that date in the east channel. The elevation is 1069.6. That at the time they measured or made this cross-section, the water,—the increased volume of water was flowing down the west side due to the fact that they had opened up the temporary dam. That at an elevaton of 1068 the ridge there would be one section of water two feet deep at the deepest place and five feet in width; another 1.5 feet deep at the deepest point,—six feet in width; another approximately three feet in width [178—86] and 1.2 feet deep; another five feet in width and 1.8 feet in depth at the deepest point; a small section at the extreme east of three feet in width and approximately one foot deep. (Tr. 186.)

He stated there is a total effective width of sixty feet. As shown by this graph there would be approximately 24 feet out of the 60 feet of width of water flowing at an elevation of 1068; at the extreme easterly end of that the width would be 3 feet from the extreme end of tail end of the cross-section.

(Testimony of Floyd W. Allen.)

The following colloquy occurred: (Tr. 186, 187.)

Q. Raising the water elevation to 1069 feet flat, what would be the situation as shown by the graph to which you are referring, as to the amount of water flowing over the ridge, and as to its average depth and its approximate width over the ridge?

A. By calculations and projections I have determined that the amount of water flowing in the east channel,—

Q. But you are not answering my question. (Question read.) Not referring to the flume.

Mr. REAMES.—May I ask a question for my own information? Where is this 1069?

Mr. KOLLOCK.—Immediately above the ridge at a point which your witnesses have designated as reef.

A. It would be forty-seven feet in width, and the maximum depth would be three feet.

Q. Varying from what to three feet?

A. From nothing to three feet.

Q. And total width of what, did you say?

A. Forty-seven feet.

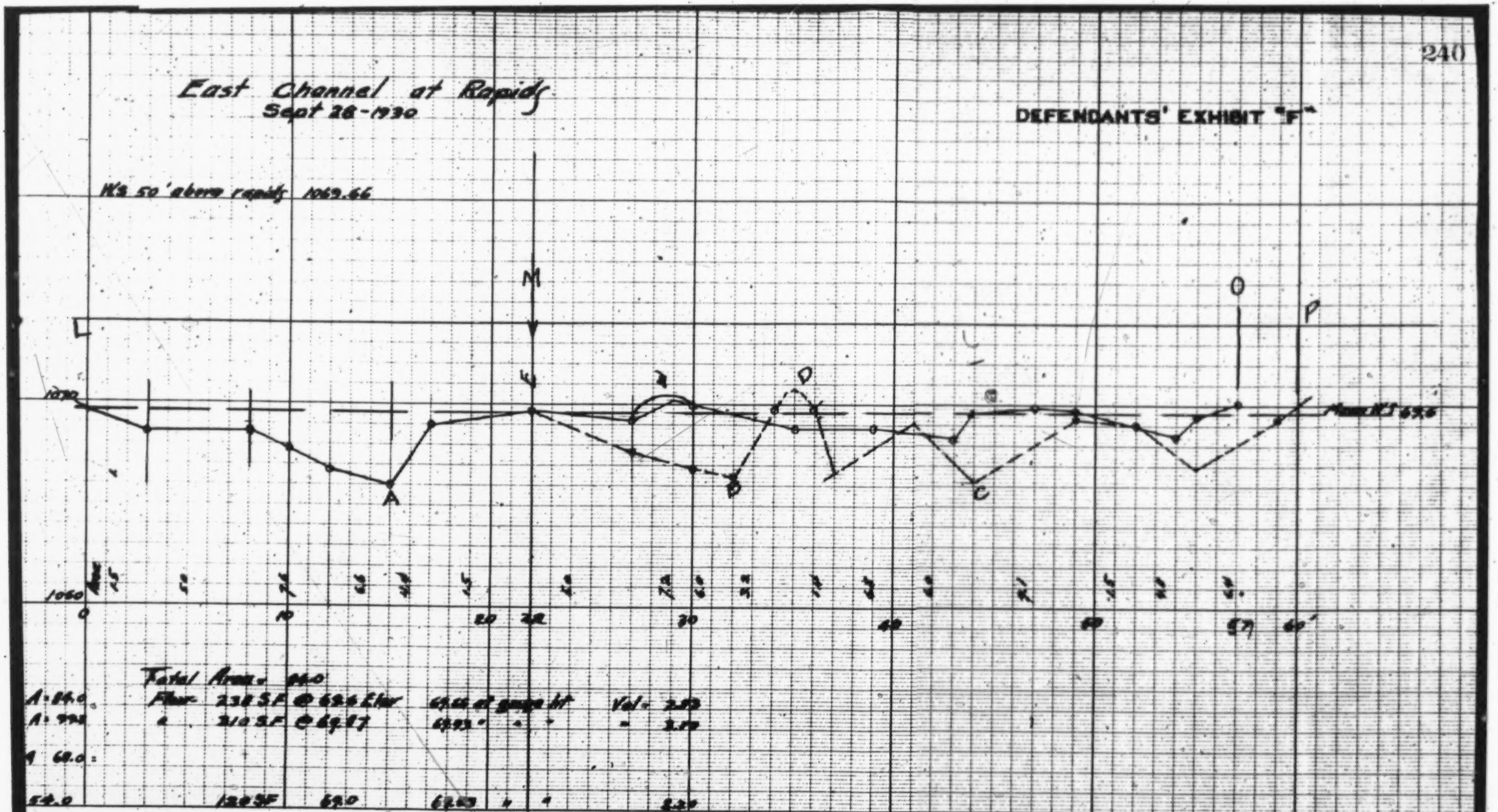
Q. Out of a total width across the reef of sixty?

A. Sixty. [179—87]

The witness was asked what effect their proposed permanent construction would have on the volume of water coming from the east towards the west at a point marked C to G on his plans of operation and answered the permanent work as proposed will cut off the flow from east to the west channel at this particular point. That would re-

duce the amount of water coming down the west channel to their headgates by 332.9 second-feet; the total amount of the water in that given area.

DEFENDANTS' EXHIBIT "F" FOR IDENTIFICATION RECEIVED IN EVIDENCE. (Tr. 187.)


East Channel at Rapids
Sept 28-1930
DEFENDANTS' EXHIBIT "F"
W.S. 50' above rapids 1069.66
M
L
O
P
A
B
C
D
1070
1060
0
10
20
22
30
40
50
57
60'
Total Area = 84.0
Flow 238 SF @ 69.6 Elev
310 SF @ 69.87
120 SF
69.0
54.0

(Testimony of Floyd W. Allen.)

The witness testified that by his present plan of development as shown by the filings in the State Engineer's office and otherwise it is proposed to maintain an elevation of 1069.0 as a minimum elevation above the point of diversion in our upper wing-dam. That the point at which this elevation is to be maintained is shown on Plaintiff's Exhibit 13, marked "Q." That he had made a complete study of the entire site with the idea of the development and in that study he had found that the economical limits to which the water can be lowered and the head maintained would require that the water be maintained in Rogue River at a point of diversion "Q" at not less than 1069.0 feet. That an economical and efficient head would vary with the stages of the river from a maximum head of 23 feet down to as low as 15 on extreme high water; that the maximum head of 23 feet is under full development of 2,000 kilowatts and is when the river has a quantity of water flowing in it of 2450 second-feet; that is their highest effective head. That their effective head beginning [180—88] with 700 second-feet under full development would be twenty-three; at 800 it would be 22.7; at 900 it would be 22.6; at 1,000 it would be 22.3; at 1450 it would be 21. That when the river stage is 1347 second-feet, their effective head would be 21.3 feet at the power plant; that the effective head begins to fall off after the quantity of water in the river passes 2450 second-feet that the effective head is the elevation of the water maintained between the forebay, immediately adjacent to the power plant

(Testimony of Floyd W. Allen.)

itself, and the tail waters or waste waters of the power plant. The elevations of the tail waters are governed by the quantity of flow that is in the river proper. Asked what effect upon the efficiency of the plant or economy of construction or operation would the lowering of the head below that designated produce, he said that with the reduction of depth to maintain the quantity of water diverted would require first, the necessity of lowering the headgates, lowering their canal, lowering their flume, increasing the dimensions of their side walls, change in the type of turbines for the generation of power and also a changed and more costly unit of generator; lowering the head also reduces the speed of the generating unit. These lower speeds are higher in proportion per horse-power than the higher speeds up to a certain definite point. He stated that he had summed it up for a lower elevation than 1069 and had found the cost per kilowatt delivered at the cement mill would be greater under that condition than if maintained at an elevation of 1069.

His attention was called to Plaintiff's Exhibit 13 and he was asked to state whether the exhibit indicates the depths to which he had referred as shown by the graph which had been offered in evidence,—the depth over [181—89] the reef ,and answered there are partial depths and elevations of the bottom of the river at the point immediately above what is commonly termed the reef. These depths are marked at elevations 68.7, 66.0, 69.6, 66.5 and 66.1. He stated that these were the lowest

(Testimony of Floyd W. Allen.)

points in that vicinity,—the shallowest points,—not the deepest water across the point. For it is the shallowest continuous water across that channel. That it is shallower than the reef "C–C" on Plaintiff's Exhibit 2, by several feet. He stated that he had made further calculations as to what effect upon the volume of water flowing in the east channel would result from maintaining an elevation at a point of diversion of 1069 and said that if elevation 1069 was maintained it would not exceed 116 second-feet passing the east channel and through the reefs shown on Exhibit 13. He was asked what would be the maximum of the water passing over that reef at that elevation and to give his conclusion as to the least amount of water that would be coming down the east channel. He stated that it would be at least 100,—from 100 to 116 at an elevation of 1069 at point marked "Q."

The witness was shown

DEFENDANTS' EXHIBIT "G" FOR IDENTIFICATION

(A photograph) (Tr. 192)

and stated the picture is a panoramic view taken from the west bank of the Rogue River prior to the blasting upon the western side of the river; that it indicated that it was taken September 16, 1928; that it shows quite clearly the localities to which he has been referring in his testimony as the same existed approximately at that date. [182—90]

(Testimony of Floyd W. Allen.)

Counsel offered it in evidence and stated that it did not have any probative value but was the best photograph to show the condition existing prior to the blasting. It was received without objection, and marked Defendants' Exhibit "G" received. (Tr. 193.)

The witness testified that he did not know whether "C–C" is identical with their original survey line which is carried all through all of these maps, but it was approximately the same at this point.

That at the point of the old survey in September, 1926, when they undertook to make the measurements or cross-sections across this identical place the water was so rapid and the water was so deep that they couldn't make the cross-section. They couldn't intelligently make the cross-section at that point.

He testified that the change in the contour of the bed of the river was noticeable immediately after the flood of 1927,—February, 1927, when the highest water of record occurred, being 90,000 second-feet,—that he noticed the change in the following summer of 1927. Asked if from his observation there was any other effect upon the rock structures and islands at or in the immediate vicinity of this location he said there was quite a protruding island immediately,—approximately in the thread of the stream,—in line with N–N on Defendants' Exhibit "E."

The court stated that the witness had already

(Testimony of Floyd W. Allen.)

testified to that, and the witness added: "to which I have already testified."

Mr. Kollock stated he did testify "had been washed away," I had forgotten that. The witness answered "Yes." [183—91]

Defendants' Exhibit "E" for identification was received in evidence. (Tr. 195.)

Plaintiff's Exhibit 13 was then marked as having been received in evidence. (Tr. 195.)

The witness testified that the effective head to which he had previously testified was the head at the point of return of the water at the power plant proper; that the effective head is variable with various stages of the river, ranging from 22.7 at low-water stage, to 21 at 1470 second-feet discharge of the river, rising again to 22.8 when the river stage is,—when the flow of the water is 2500 second-feet, and then diminishing more or less at a uniform rate as the rise of the river from approximately 15 feet lowers the effective head. That the effective head is the difference in head between the surface elevation of tail waters or point of return of the waters to the main stream and the waters immediately adjacent to the power-house, or the waters in the forebay; that if you reduce the effective head it would reduce the efficiency of the plant by practically the same ratio as the loss of head. As to the varying head with reference to the cost of production per kilowatt, he stated they had designed this plant for three different canals. The first one is the complete diversion where the water is raised

(Testimony of Floyd W. Allen.)

to a fixed elevation in the river of 1073.0. That would be the lowest stage at all times; that is where the dam would be built completely across the river.

Objections of immateriality were sustained, and the [184—92] line of questioning abandoned.

The witness stated that in the development of the present plan of operation it had never been his intention to lower the elevation of the river below 1069; that at his recommendation Mr. Muirhead advised him to employ Mr. Brubaker, the aerial photographer to have aerial maps or aerial photographs made that they might be converted into aerial maps. These were made in the fall of 1930.

He produced

DEFENDANTS' EXHIBIT "H."

and stated that it was the resultant of several aerial photographs taken from aeroplanes,—a mosaic at an approximate elevation of 3,000 feet in the air. That it was taken by the Brubaker Aerial Survey while the witness was on the ground. That the picture quite accurately shows all the details there of the existing structures and condition of the ground on the date of the survey in 1930; that it is drawn and enlarged to an accurate scale of one hundred feet to the inch; that it is accurately scaled; was taken September 30, 1930, which was after the blasting was done and prior to the former hearing of this case, which was in October. The witness stated that the place where he placed a red ink mark on the exhibit showed the location of the

(Testimony of Floyd W. Allen.)

proposed diversion dam; that the dotted line appearing down the center of the apparent bed of the stream is an imaginary line for the thread of the stream as previously determined on other maps exhibited in other cases and platted on the photograph by the witness; that the area blocked out on the trapezoid A–prime (A′) is approximately the boundary of the blasted area on the [185—93] west side or west bank of the stream; that he arrived at the determination of that area so blocked out by him from the best evidence on the ground and from hearsay,—from evidence that he could collect from various people; that he didn't make an actual survey of the property himself; that from the best knowledge he could obtain this boundary line includes the area blasted.

The Court admitted the exhibit in evidence on the agreement of counsel simply as a purported bird's-eye view of the locality which the Court would check with other information at hand and having no probative value at the time and marked

DEFENDANTS' EXHIBIT "H." (Tr. 202.)

DEFENDANTS' EXHIBIT "H"

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(Testimony of Floyd W. Allen.)

As to the accuracy of the exhibit as to scale, the witness said that markers were placed every 200 feet along the highway and certain identifications on the river. These are shown on the map. These markers as shown on the map the witness marked with a diamond in blue; stated that white marks were placed along the highway at 200-foot intervals. All of them were not visible on account of the shade from the trees, but a sufficient number were visible to enlarge the photograph to a given scale. The white area shown as "C" is concrete pier placed upon the east shore prior to this photograph and the building marked "D" exists upon the ground both of which are a known distance apart. The enlargement was made to conform both to these previous markers on the highway and the given distance from C to D. As to the known distances between the buildings, the witness stated they are known by reason of the fact that they have this survey and from the previous map and they [186—94] have these from actual survey; that it is irrespective whether it is measured upon the highway or straight through, or around this way, it will figure out the same distance. He stated that he had made a comparison between the photograph as produced and that these spots indicated in an actual survey on the ground. He then took Defendants' Exhibit "I" for Identification,—

DEFENDANTS' EXHIBIT "I" FOR IDENTIFICATION (Tr. 203)

and stated: This is made from a survey in 1926 drawn to scale, 100 feet to the inch, with such subsequent surveys identifying structures that were completed since that date. He stated that he thought the best comparison was to place the tracing immediately over the photograph which the record shows the witness did. The witness was told that in order that the record may be clear he should make a statement explaining that he was now making a comparison between the aerial photograph and the tracing and he answered: "For all practical purposes, it is identical." That it showed two structures to which he had referred as identical. That the map is on a scale of one hundred feet to the inch; that the other map is on a scale of 50 feet to the inch; that he made the tracing in 1928; that the survey was made in 1926 and the photograph was taken in 1930; that he has made a blue-print from this tracing; that it was in evidence in court in 1928; that it was on this same scale; that he did not have it in court. He was asked if the map was based on the original survey made by Mr. White and stated,—"It is a copy of it." That it was the first case in equity that that map was made for. [187—95]

The witness stated that there were two such photographs of the upper regions on the river,

(Testimony of Floyd W. Allen.)

meaning by that extending from the falls to the north line of Section 15. He explained that the falls were up opposite the headgates of the canal. He stated that this mosaic was taken about 1:30. Asked if he meant the photograph from which the mosaic had been made, he answered: Yes, about 1:30 September 29th. That an hour later there was a series of photographs taken from the north line of Lot 15 to approximately the south line of Lots 1 and 8, Section 15. That the flow of the stream was changed between the time the two photographs were taken, as follows:

The splash boards along the temporary diversion dam extending from the southerlymost islands to the concrete headworks near the headgates were partially removed; also that the gates in the concrete diversion dam were opened allowing increased flow of water in the westerly channel of the river and returning back to the main channel through the point of diversion,—or through the temporary wing-dam. He said he had a photograph taken of that changed condition.

The Court admitted as an original exhibit, Defendants' Exhibit "I" for Identification,—Defendants' Exhibit "I" Admitted (Tr. 208)—based upon the fact that the witness had testified that it is accurate to scale from notes of the survey.

The witness was then shown

DEFENDANTS' EXHIBIT "J" FOR IDENTIFICATION (Tr. 208), [188—96]

and stated it is a sectional aerial photograph made for the purpose of showing the increased flow in the westerly channel of the river by reason of opening up the temporary diversion dam extending from the concrete headworks to the southerlymost island. He stated that he meant that it was a mosaic from the aerial photographs,—that there were three of these aerial photographs making up the mosaic,—that the lines thereof could be seen on the exhibit. The Court, by agreement, admitted the Defendants' Exhibit "J" (Tr. 209), under the same conditions as those under which he had originally allowed Exhibit "H" to be introduced.

The witness then testified that Exhibit "J" was on the same scale as "H."

Asked to point out the changes in the river flow he stated the first apparent increase to which he wished to call attention was the water passing through the temporary diversion dam extending from the island to the main land near the headgates. The picture also shows quite an increase in the riffles in the water from the outermost and northerly island to the larger of the islands in the center of the stream; this is the reef extending from the two islands mentioned; that close examination will show a decrease in the white waters in the east channel of the reef extending from the centermost island to the east shore of the river;

(Testimony of Floyd W. Allen.)

that this explanation apparently covers all changes in the photographs.

He stated that the water in the east channel is decreased by 72 second-feet as stated in his previous testimony. This is not shown on the photograph. That the decrease [189—97] of the flow in the river over the reef by the opening of these points below was produced by reducing the head or reducing the water in the still waters or head of the diversion dam to a lower elevation, increasing the head of the water between the main channel above the islands into the still water, allowing a larger volume and higher velocity through these openings known as the narrows which he marked "X" and through the reef marked "Y" upon photograph "J." That this last to which he had referred is the channel in which the water flows from the east to west in a considerable amount over to the west side of the river and the exhibit shows an increase in the flow over the reef in the area marked by the letter "Y"; that this reef which he is talking about is the one which they intend to build up higher and shut off the 330 second-feet from going to the westward; that it is the reef location of which will be included in the location of the permanent wing-dam which they are now constructing.

Mr. Kollock stated that this was entirely different from the reef "C–C."

The witness stated that he believes it is indicated by Engineer Olsen by the letters B–C and can be referred to as that. The witness stated that he

(Testimony of Floyd W. Allen.)

had been able to draw the conclusion that if there was no wing-dam or diversion dam extending from the concrete headworks or gates at the entrance of the canal to the southerly island, the water flowing in the east channel or over the reef would not be much in excess, if any, of 50 second-feet. (Tr. 213.)

At this point, witness was withdrawn to accommodate Mr. Brubaker. [190—98]

TESTIMONY OF WILLIAM C. BRUBAKER, FOR DEFENDANTS.

WILLIAM C. BRUBAKER, called upon behalf of the defendants, testified upon direct examination by Mr. KOLLOCK. (Tr. 214.)

That he was connected with "Brubaker Aerial Survey" not a corporation, but having an assumed name. That it was engaged in aerial photography and surveying. He started that on October 14, 1930, he had made certain aerial photographs of the Rogue River in the vicinity of Gold Hill; that at the time he was with Mr. Muirhead and Mr. Allen; that Mr. Muirhead is the vice-president of the defendant cement company and Mr. Allen the engineer. Referring to Defendants' Exhibit "H" and "I" he stated that they took "H" first. The exhibits are mosaics built up from photographs taken at the time,—taken just a few seconds apart, that they flew across in a southerly direction to an elevation of about 3,000 feet and took the first series of pictures about 10 seconds apart, and then went on over into the mountains to photograph the

(Testimony of William C. Brubaker.)

quarry over there and to wait awhile until some changes were made in the river; that they came back in about forty or forty-five minutes and followed across the same way again and made another series of photographs; these being in mosaic Exhibit "J."

Asked how many photographs were present in the mosaic exhibit introduced as Exhibit "H" he stated "the upper one has about five pictures in it and the lower one about three I believe." That he was flying at a velocity of about 90 miles per hour; that he had been working in the business for about 9 years and had done work for the Geological Survey and many big companies; mapped the upper Columbia [191—99] River for the Government.

He stated that the Geological Survey built up very accurate maps from these photographs and that he had platted maps by using certain ground controls, working with the engineers on the ground that have went into various courts; the Federal Court at Tacoma,—and he has a letter from the Geological Survey that photographs made of the upper Columbia River were very good; that certain measurements must be made on the ground so they can make these photographs to that scale.

They told him that there were certain marks put upon the ground for measurement and these were made up and he used the ground controls; that if definite survey stations are marked on the ground at a definite distance apart, he would consider mosaics so made up practically accurate; a certain percentage,—probably one per cent error is what they allow in contracts on a map of that kind; that

(Testimony of William C. Brubaker.)

there were five photographs in Exhibit "H" and three in the lower one; that it is usual to fly a great deal higher than they flew in this instance, in which case they don't have to shoot so many pictures; that they could cover all of this in one picture if taken from an elevation of 10,000 feet; that in a real rough country they usually fly ten thousand feet high or higher, but here they wanted to show the water conditions very plainly so they flew low; that this may give a little error up the side of a hill or down in the river bottom but are very close. In mapping rough mountains you have to go a great deal higher than 3,000 feet; that he had checked the levels,—they are on the camera. We keep them as level as possible so we can see when we snap the picture, then we change it to the ground control in the studio,—we take the negative and bring it to the scale [192—100] of this ground control,—the camera is tipped a little and tipped back again to make the prints; that crabbing does not make a distortion in the photographs,—it just twists the picture around,—it is the hills,—lying up close to the hills and not having the picture level that throws them out of scale,—crabbing just screws them around a little,—doesn't make any difference in the mosaic.

That in order to get an absolute accurate survey, you have to check with the ground maps; that in some methods and some equipments they claim to make an accurate map. The Government makes them with only three control points in 10 miles,—that is all we did on the upper Columbia River.

(Testimony of William C. Brubaker.)

We made the pictures and they built the mosaics themselves. Their method there was three control points,—a triangle,—they carry it for ten miles and put contours on as close as two feet,—and Boulder Dam,—I didn't do it, but the Government done it and they claim closer than what they could do on the ground.

Asked if he would testify that H is that close,—answered "I would not say that,—just exactly how accurate that is,—it is built from ground control." Asked if it was the same way with "J", he answered,—both the same. They principally show the details in between these ground controls.

TESTIMONY OF FLOYD W. ALLEN, FOR DEFENDANTS (RECALLED).

FLOYD W. ALLEN, recalled, direct examination continued by Mr. KOLLOCK.

He said that Exhibits "H" and "J" were on the same scale. There is not as much in "J." Asked if he had a definite plan for automatic control for the cement company he answered there [193—101] has been a plan for automatic control from the very inception; that the control is,—to start with, the turbines themselves, the quantity of water flowing through them, is controlled by the demand for power. The gates of the turbine are opened and closed automatically with the demand for power, by the load upon these turbines. The size of the turbines governs the maximum quantity which may be drawn through these gates, together with such regu-

(Testimony of Floyd W. Allen.)

lations as you want to set the gates at to permit the maximum volume of water to pass through. It is quite feasible and possible to regulate the governors not only to control the quantity of water, but also regulate the momentum within certain limits. Other features of regulation are remote control which will be at,—the point of control will be the cement mill itself, but the automatic features,—all the automatic features that are known practical are adopted in this plan. (Tr. 220–1.)

Asked if it was entirely feasible and possible from an engineering point of view to set the governors so as to regulate the elevation of the water or head, he answered that in this particular instance the elevation of the water will be regulated by total flume or draft through it; there may be a slight drawdown at your forebay, but it would not be effective upon it as far upstream as the point of diversion or above the uppermost wing-dam, because the slight increase in draft with very normal use would be comparatively momentarily due to starting loads and would not be a sustained condition. That their pondage is entirely limited to the canal itself and what little water in the flume and forebay, it is not feasible,—practical,—to expect or depend upon any pondage above the headgates because there is construction there which automatically reduces the head at this point so the loss [194—102] of the head through these headgates is taken into account. That there is no pondage above the headgates.

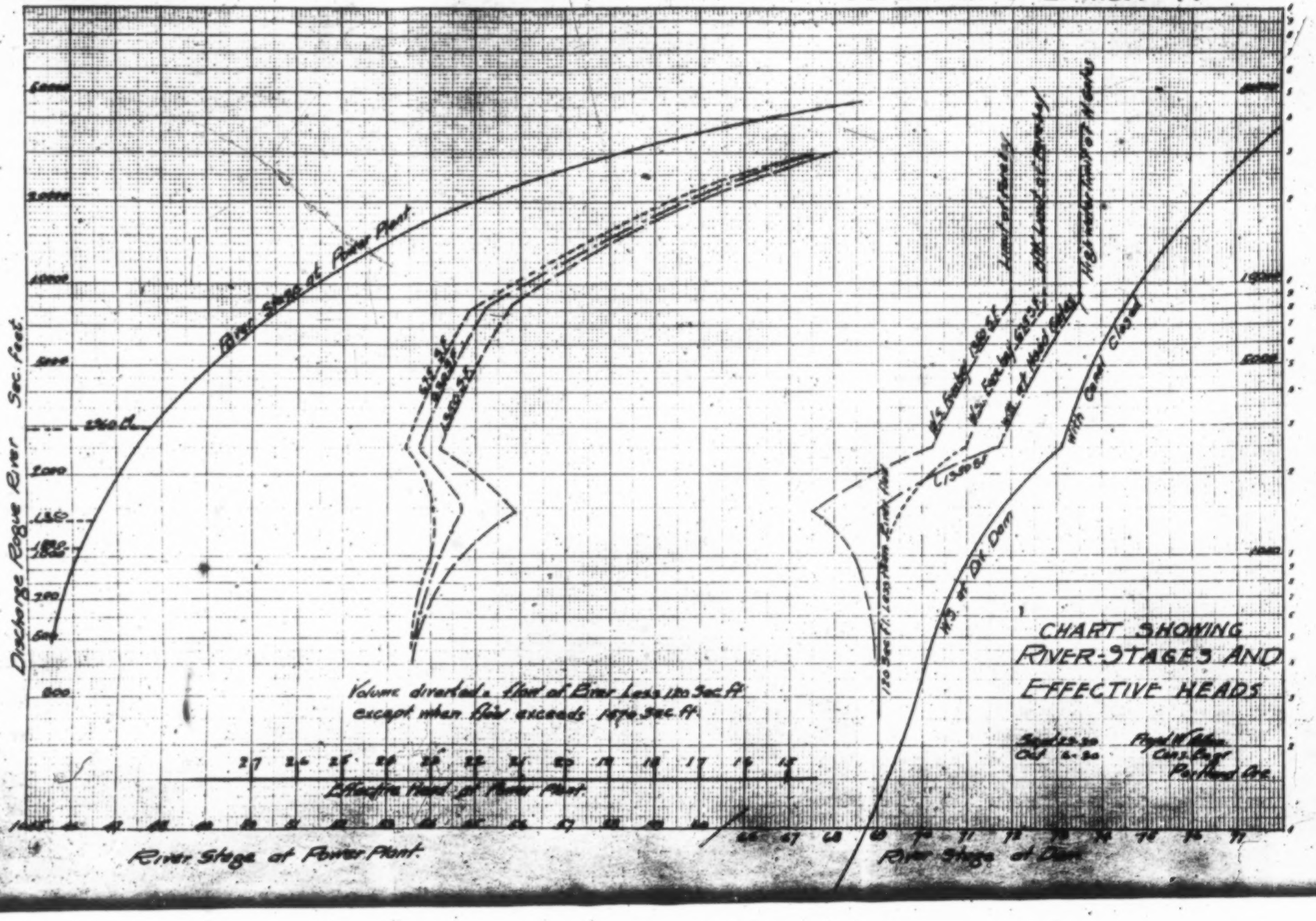
(Testimony of Floyd W. Allen.)

The second thing that controls the matter is the capacity of the canal and flume itself at certain stages of diversion; the flume particularly is regulated or designed that it has practically the capacity at the various heads for which the plant is designed.

Asked if it was entirely feasible to so construct and regulate the plant that the elevation of the water at the point of diversion would not be reduced below 1069 irrespective of the demand of the load he said the head can be maintained at all times as such regulations required and it has always been his intention to have it so maintained; that this is practically a stream-flow plant, meaning that it is based upon the normal low water of the stream with such raise as is practicable to divert without any pondage; that he had not prepared any further maps in connection with the matter which he wished to introduce. (Tr. 222.)

DEFENDANTS' EXHIBIT "K" FOR IDENTIFICATION.

DEFENDANTS' EXHIBIT "K"



(Testimony of Floyd W. Allen.)

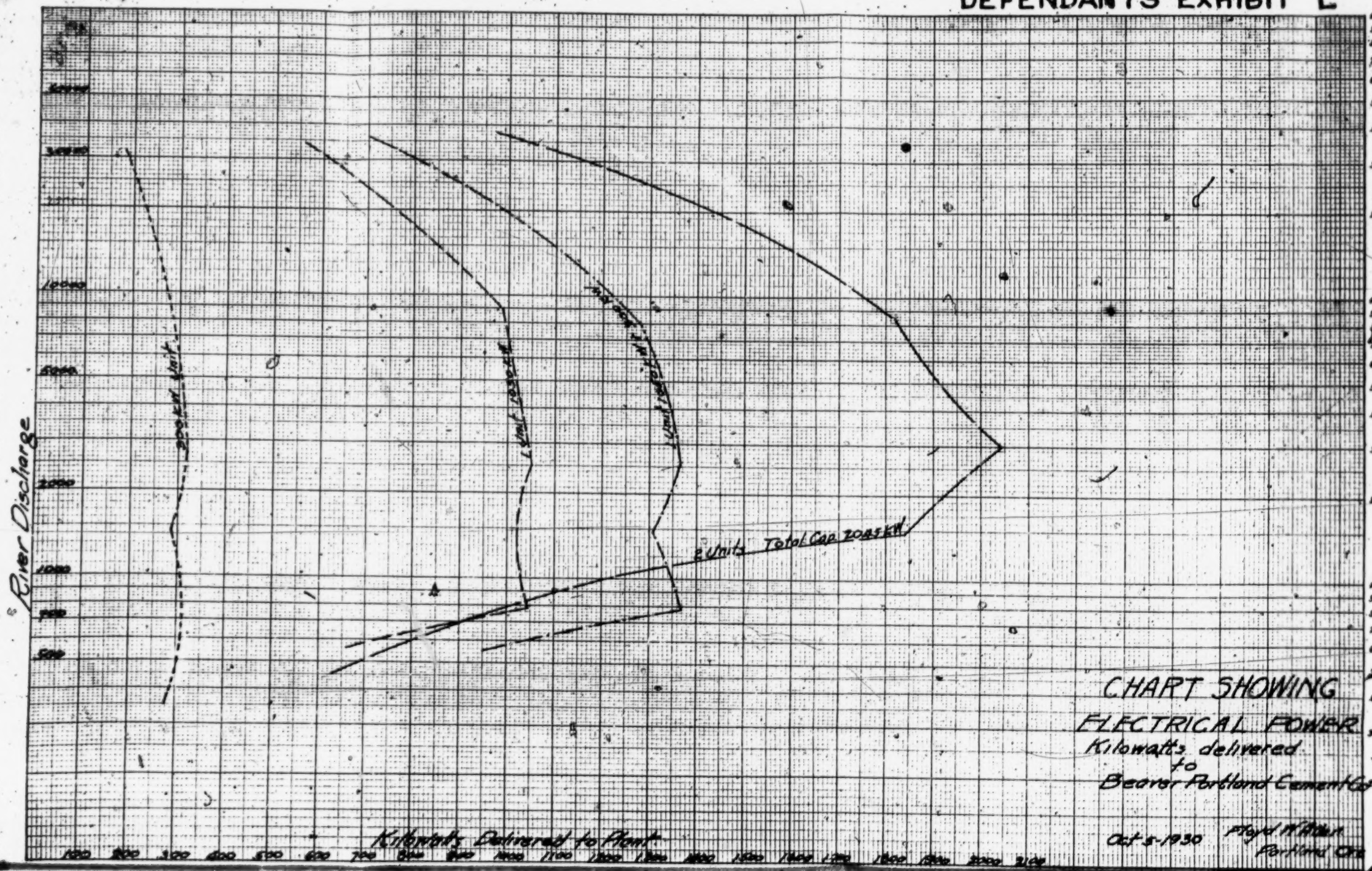
The witness stated that it is a copy of a rating,—curve showing effective head that can be produced at the power plant under different stages of the river to which he had before testified in general and that upon the graph which he had prepared the effective head was limited between 23½ to 15 feet.

Mr. Kollock offered the exhibit as simply showing the graph, and it was received without objection as Defendants' Exhibit "K." (Tr. 223.) [195—103]

The witness was then shown

DEFENDANTS' EXHIBIT "L" FOR IDENTIFICATION. (Tr. 223.)

DEFENDANTS' EXHIBIT "L"



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(Testimony of Floyd W. Allen.)

and stated that it is the resultant of the power that can be delivered with all losses considered, at the cement mill under the various stages of the river, shown in four lines, representing a 300 kilowatt unit; one 1050 kilowatt unit; one 1050 kilowatt unit plus 300 kilowatt unit, and total of two units of 2045 kilowatts.

He stated that these were units that they proposed to install, this being a graph representing graphically his former testimony upon the subject.

It was received without objection as Defendants' Exhibit "L." (Tr. 223.)

The witness was shown defendants' exhibit,—

DEFENDANTS' EXHIBIT "M" FOR IDENTIFICATION. (Tr. 223.)

and stated that it is a platted discharge by months from the year 1906 to the year 1925, inclusive, showing average monthly discharge of Rogue River during this period of time; that this data was compiled from U. S. Coast and Geological Survey stream flow records compiled by himself from original records and printed records of the geological survey.

He stated that these stream flows are based upon the Gold Ray station, 4 miles above the point in question; that he was familiar with the river between the point [196—104] in question and the Gold Ray plant; that there was only one diversion point betwen the two,—that was Gold Hill Irrigation (meaning district) of 25 second-feet; that at times there was quite a large flow of water coming

(Testimony of Floyd W. Allen.)

in between the two points from Sam Creek and tributaries. That all calculations as to power have taken into account the diversion of the Gold Hill Irrigation District.

He said that he had not taken into consideration the flow from Sams Creek.

The Court admitted in evidence Defendants' Exhibit "M." (Tr. 225.)

Cross-examination by Mr. REAMES. (Tr. 226.)

Witness was shown Exhibit "M" and asked why the figures were not extended beyond the year 1925 and he stated that it was made in 1926.

His attention was called to his testimony as to stream flow measurements made in September, 1930, on September 26, 27 and 28, 1930, and as to whether the flow of the stream on each of these dates was large.

He answered that the average flow per day at Gold Hill was less than the figures he had presented to the court; that the flow on these different dates was not entirely uniform.

His attention was called to the fact that he had testified that he had compensated for that, which he said was correct. He was asked if he had any rating curve [197—105] extending over a long period of time or anything from which to base that compensation and answered no, that he had daily notes of the rating curve from individual section measured but that he didn't have any records of these sections at any other time, but he could make

(Testimony of Floyd W. Allen.)

a reasonable compensation for that correction which he did, which was not shown in his testimony; not absolutely a perfect compensation,—that it doesn't close exactly,—that in other words so far as he knew no one had ever taken the ratings at any other time at these places. He answered, not to his knowledge. He was asked if he tried to adjust the difference betwen the stream flow of the 26th with what it might have been on the 28th just by guessing at it.

He answered,—well no, it wasn't a guess by any means, because it was based on the highest velocity the surface area and the difference in the height of the stream at that particular point, but he stated that he hadn't taken the velocity but the one time.

His attention was called to blue-print "F," introduced as Defendants' Exhibit "F," on which there were shown certain broken lines and certain straight lines. He was asked to state why they were indicated differently,—for instance at elevation "B," that this is a broken line.

He answered the first portion in the cross-section extends from an island more or less in a northeasterly direction, and extends on up to a small island in the center of the stream which terminates there at 30 feet from the island; that they again started in at a point 22 feet from the island,—not the same point,—and cross-sectioned in an easterly direction across the shoals into the main line of this channel. He stated the reason for [198—106] that is that a part of the first portion sectioned from station .00 to 30 is shown in solid line to keep from being con-

(Testimony of Floyd W. Allen.)

fused with that part extending past the continuous cross-section across the river; that they backed up to station 22 and from station 22 to the east channel is all shown in dotted lines so it would not be confused with that small portion extending from station 22 to the line in the center portion. The distances are indicated at 10 foot intervals; that he made the survey on September 28, 1930.

He was asked to produce the notes of the survey. He stated that his notes were put on a loose-leaf book.

He was asked whether or not at the former trial of this case he had testified concerning these elevations of that reef on the east side. He stated that he did. Asked if he gave those elevations at 66,—66.4,—the bedrock elevations which he had indicated on this blue-print, he answered that he was not sure of it, but had a recollection of some testimony to that effect.

He was asked if he remembered that what was Exhibit 10 on the first trial was Exhibit "6" here; that his folder containing the filings in the State Engineer's office contained all of the sheets upon which Mr. Muirhead had been examined at the former trial showing the elevation,—the lowest elevation on the reef, which is plaintiff's "C–C" to be 68 feet,—whether he remembered that was identified in the former case and that,—

Here Mr. Kollock objected to the line of examination as not being proper and the Court ruled that it was cross-examination.

(Testimony of Floyd W. Allen.)

The witness stated I do not recall testifying to that. [199—107] He was asked if he recalled that if was identified by Mr. Muirhead before this witness went on the stand in the first trial of this case and answered yet; that he believed all the maps were identified by Mr. Muirhead at the trial, including that one. He said that he really did not know whether all of the maps in that Exhibit 10 were identified by him at the former trial.

The following questions and answers were then given: (Tr. 229.)

Q. Did you testify at that other trial with reference to having made, taking these readings of all the elevations at the reef, that you were showing on this exhibit?

A. I have testified in court, in that previous case, to making an examination of that, I am quite sure. In other words, it is entirely memory now, but I am quite sure.

Q. Isn't this trial the first time that that evidence has been given?

A. This is the first time that that profile has been submitted in evidence.

Q. And also that the readings on there, for the reef, have been testified to?

A. No, I have testified to that reef before.

Q. In the last trial, before *June* Bean?

A. In the last trial, yes.

Q. Will you look at that transcript of testimony between now and our coming into court to-morrow morning, and refresh your memory?

(Testimony of Floyd W. Allen.)

Mr. KOLLOCK.—Isn't it the proper procedure for counsel to point out to this witness what he testified to?

COURT.—Never mind; he has asked him to do something. He has the record, and can verify it. [200—108]

The witness was then asked what he meant by effective head and he testified, effective head is the head produced between the forebay and the tail waters at the power plant; in other words, it is the waters at the entrance to the power plant and the tail waters of the power plant,—the difference in elevation of the waters at the power plant, of the tail waters; that in this plant they would vary considerably ranging from maximum height in the forebay waters, will not exceed,—the maximum height of the forebay waters will not exceed 73. He testified that the maximum elevation of the water in the forebay is 72 at 1350 second-feet diversion and the tail waters will range from elevation 1045.5 at extreme low water,—1045.7 to,—well, the maximum elevation has reached the elevation of 68 at flood stage; that the forebay is immediately adjacent to the power-house within an area of 50 feet,—a limited distance of 50 feet. That the variation there is minimum of 67.5 to maximum elevation of 72, water surface.

His attention was called that he had testified to the cost per kilowatt being increased as the water elevation was drawn below 69. He was asked to enumerate briefly what these costs would amount to,—of what they consisted and how much per kilowatt the total addition of these things would be.

(Testimony of Floyd W. Allen.)

He stated he was basing that entirely upon the cost of the three plants as previously designed by arranging different heads. He began to explain what the first plan of development called for and his attention was called to the fact that he had said it was not practical or economical to go below 1069. That he had explained that by saying it made certain changes necessary,— [201—109] some in the canal, —and that this would increase the kilowatt cost. He was asked what these changes were and the cost thereof. He stated that he didn't have the detail of the increased cost below 69 elevation. Asked to give it comparatively he stated it would practically for all practical purposes increase from five to fifteen per cent. The amount in money would be $10,000 to $30,000 for the entire installation; that he had no figures but was just estimating that. That the biggest item of cost would be the additional area required in the headgates at the upper end of the diversion canal; the depth of a foot over and above the depth already planned which is all in solid rock at that depth; the lowering of the floor level of the flume and still maintaining the wall heights of the flume and the increase in the cost of the type of turbine that would be required for a lower head with larger flow; also increase in cost of generator due to the fact that the lower head reduces the speed of the generator. (Tr. 233.) [202—110]

(Testimony of Floyd W. Allen.)

FLOYD W. ALLEN, witness for the defendants, whose foregoing testimony was taken on Wednesday, April 29th, resumed the stand, in cross-examination, on Thursday, April 30th, 1931.

(Questions by Mr. REAMES.)

The witness was asked and answered:

Mr. Allen, speaking of the measurements which you say you made on our reef on the east side, corresponding to C–C on this Exhibit 2, on September 28, 1930, I will call your attention to the fact that the trial of this case before Judge Bean, of this same case, began on October 14, 1930. I asked you yesterday if you testified at that trial to having made these measurements of the elevations of the bedrock just above that reef. Did you at that time testify concerning that?

A. I looked over the testimony. I find I did not testify as to the depth of the bedrock; I did testify, however, to the water flowing over that reef, by actual measurement. In other words, I had calculations based upon those depths, which were given at that trial.

Q. Those depths were not mentioned?

A. The depths were not mentioned in my testimony.

Q. Now at that trial there was an exhibit, No. 10, Plaintiff's Exhibit 10, which has become Plaintiffs' Exhibit 6 here and as a part of that there was this sheet, which is marked Sheet No. 2, which shows the elevation of that reef to be what? [203—111]

(Testimony of Floyd W. Allen.)

A. The elevation of the reef is shown at approximately 68.2 elevation.

Q. And the case before His Honor Judge Bean was tried out, was it not, upon the basis that this indicated on your map as the lowest point on that reef of that bedrock elevation there 68.2?

A. None of my testimony referred to that, or none of my calculations referred to that particular cross-section there.

Q. Before you had gone on the stand this had been introduced, had it not?

A. I think it had, yes.

Mr. KOLLOCK.—That was plaintiff's exhibit, was it not?

Q. Plaintiff's Exhibit 10, in that trial, and is now 6 here. And you now testify that preceding that trial you had, on the 28th day of September of that same year, made these soundings and these measurements, and determined the bedrock elevations that you gave here in your testimony the other day, going down as low as 66.2 or 66.4? Exhibit "F" will show that. You now say that you found on September 28, 1930, that elevation to be what, the lowest elevation? A. 66.0.

Q. 66 flat, and several other readings; how many others have you noted?

A. I mentioned two there, three other low points.

Q. What were they?

A. One is 66.4, another one 66.2. (Tr. 234–5.)

Asked if these soundings at that point are now shown on Plaintiff's Exhibit 13, he answered that

(Testimony of Floyd W. Allen.)

all soundings that he took across the stream are not indicated on the map, but the main [204—112] of them are shown in red line, extending from X to Y.

He testified that his testimony with reference to this exhibit was not based upon any map that he produced, or any blue-print of this map, stating that he used plaintiff's map because he had planned the same exhibit himself.

He testified that on the 10th day of April, 1931, he obtained from the State Engineer's office, Plaintiff's Exhibit 7 for Identification, which is Defendants' Exhibit "B."

At this point Mr. Kollock, for the defendants, stated that the exhibit had not been received in evidence.

The witness was asked if, when Mr. Muirhead had been upon the stand, and when Mr. Muirhead's attention had been called to the new filings, and they were mentioned, and the demand was made by the plaintiff to have the same produced, that this witness had caused the Defendants' Exhibit "B" to be handed to the plaintiff's attorney, and he answered "Yes." He stated that he had not included in the certified copy of these records any sheet corresponding to Plaintiff's Exhibit 13, which shows these readings at the reef, to which the witness' attention had just been called. He was asked if he had this certified copy made up by the State Engineer on the 10th day of April, why did he not include in that a copy of this sheet, Plaintiff's Exhibit 13, which does contain these readings, and which the witness had

(Testimony of Floyd W. Allen.)

said was made just prior to the last trial. The witness answered that there is another set of copies exhibited here which is a separate attachment which was filed on the date that he made his trip to Salem (April 10th). That these copies of filings were prepared prior to the previous case, or prior to any former case.

The second exhibit contains the supplemental sheets [205—113] which were filed on April 8th, 1931, in the State Engineer's office. They were brought here for exhibit.

The witness was asked if it was not a fact that when plaintiff's attorney was asking for these filings that were made after the case had first been tried, that the witness had produced the one that did not show these elevations which he now claims he had taken on the 28th of September, 1930? He said: "I don't know as it does."

He was asked to state the date he filed Plaintiff's Exhibit 13 with the State Engineer and answered it was April 8th.

He was asked then why he did not include the same in the exhibits so certified to on April 10th. He stated that he did; that there is the certification of the copy, this certified copy, that it just happens not to be in the same enclosure. The witness was then asked to take Plaintiff's Exhibit 7, the profile with reference to the measurements of the reef on the east side and look at the same closely, and see whether or not it contains marks above the cross-section marks there, and what they are. He

(Testimony of Floyd W. Allen.)

answered: "There is a light dotted line extending 57 feet of this total 60 feet, the light dotted line—I mean the line shown above the heavy dotted line is the elevation of the river bottom at the different locations extending from a point 22 feet from the island northerly."

Asked if this little faint line was erased before the blue-print was made, he answered "No." He was shown the tracing and answered: This tracing from which this blue-print was made—that is the tracing from which this blue-print was made, and that line is quite faint on the tracing. That is not a controlling factor, and had nothing to do with the—

He was interrupted and asked: If you take any one [206—114] of these that does show up reasonably plain with these circles, what does that indicate if it does not indicate higher elevations? And answered: From a distance twenty-two feet from the island to a point 57 feet, is elevation from the stream bed from a small island approximately the center way from the larger island to the east mainland, upstream a distance of 35 feet. That he was endeavoring to see if there was any flow from the westerly side of this small group of islands, to the easterly side. He started directly from a point 22 feet from the islands and went directly to the east shore of the river so what appears on that profile has no bearing on the marks or low elevation between the island and the east shore.

The tracing produced by the witness was marked Exhibit 19 for Identification (Tr. 239).

(Testimony of Floyd W. Allen.)

The Court requested the Plaintiff's Exhibit 1 for Identification, which now contains the explanation of the witness of this tracing in red, marked in some such way that these marks placed thereon could be identified.

The COURT.—Place red marks on Plaintiff's Exhibit 1 for Identification, extending from 22 to where?

A. "L" to "M" as indicated on the profile, Exhibit "F," in red. From "M" to "O" is likewise indicated in red on "F," that being faint line upon the profile. Line "M" to "P" was marked on Exhibit "F" as terminating at "P," that being the dotted line from "M" to "P."

"COURT.—You have also indicated the line upon which these measurements, shown on the profile, Defendants' Exhibit 'F,' on Plaintiff's Exhibit 1 for Identification, being the same letter identification marks?

A. Correct." (Tr. 239-40.) [207—115]

The witness stated that the operation of the electric plant, the amount of water drawn into the turbines depended upon the amount of load used at the cement mill. And that that load pulled at the cement mill automatically caused the wheels and turbines to receive the quantity of water, which at the head would make that much power. He stated that the plan was to maintain a water surface elevation of 1069 at the point, upper end of the diversion dam; upstream end of diversion dam, which is possibly a thousand feet above the contemplated headgates at the beginning of the canal. (Tr. 240.)

(Testimony of Floyd W. Allen.)

His attention was called to the fact that heretofore he had used the expression of maintaing the surface elevation at 69 at the headgates, and whether there was any difference between the two places, and stated: There will be a slight difference not to exceed one or two tenths of a foot. He said that notwithstanding the varying amount of power being taken at the cement mill, the surface water elevation of 69 at the point mentioned would not vary more than—the lowest point would not exceed probably 69.1, but that he had allowed the lowest point at 69.0. This is at approximately 1,000 feet above the headgates. That it is opposite and about fifty feet above the shattered area, that is up stream from the shattered area.

Asked for his plan for maintaining uniform elevation at this point with a varying load at the cement mill, he answered that the load is not so variable at the cement mill; that in other words, the cement mill has quite a constant load with the exception of starting loads, which throw a momentary load on the current; that starting load is of short duration, and the slight pondage which you would have in the flume and forebay and in the canal itself, is sufficient to regulate the starting condition. [208—116]

He was asked how much power he planned to make and keep the surface elevation standing at 69, and said: That they were not able to make any more power than the stream flow would permit at that time. That is a variable power. In other

(Testimony of Floyd W. Allen.)

words, they could generate a variable power quantity. That with a flow of 700 second-feet, they would be able to generate only 900 kilowatts delivered at the plant, although the demand would be very much greater. He was asked what there was to prevent the plant from drawing on the pondage above the headgates and answered: At that stage it would be limited to one unit of the river, meaning one unit of the two. That it was planned to build two units of a thousand kilowatts each. He was asked: Supposing that they were using both units, and they had only that amount of water in the river, and they had a power demand for fourteen or fifteen hundred kilowatts, how would they keep the cement plant from drawing the extra water out of the pondage that was above? And answered: That they could not operate any fourteen hundred kilowatts when the river—unless the quantity of water passed by 120 second-feet that he had testified to before, would not develop fourteen hundred kilowatts. It would only develop nine hundred kilowatts to start with.

He was asked if he could not, for an hour, or perhaps two hours, be drawing on pondage and make more power. He answered: "Yes," it would be possible to a limited extent. That would be only an additional 120 second-feet. That would be again governed by three factors. In other words, the opening of the headgates, at the entrance of the canal, the capacity of the canal itself, which is diminished at the lower flow of the river, and the

(Testimony of Floyd W. Allen.)

diminished capacity of the flume itself at the lower stage.

He was asked to assume that they had 1347 second [209—117] feet, whether then the canal was big enough to utilize it. He stated that the plant was big enough to take 1347 second-feet. Asked if his canal and plant was not big enough to take 1347 second-feet, he answered: "At a stage of the river when it will rise to that."

He was then asked that with 700 second-feet in the river with this plant in operation, and the amount of water used controlled by the demand for power in the cement mill, what there is to prevent the cement company from drawing off the pondage from Lots 1 and 2 from behind reef C–C, shown on Plaintiff's Exhibit 2, and answered: "In that particular case, when the river is low, the only thing to prevent us would be we could shut down one of the two units."

Asked if that would be practical in ordinary operation, or whether the company would not take the power that was available, if it needed it to operate the two units, he said: "In the study of the cement industry and its relation to this power, we have determined that we do not need that power during that low flow of the river." He was asked if it was not a fact that the best market for the cement, when the most of it should be made is during the low flow of the river, instead of the high flow of the river, and said: That the demand for the sale of cement is in the summer months, but the raw end

(Testimony of Floyd W. Allen.)

and the burning end occurs, and should occur six months prior to the sale of the cement. Asked to tell the Court what months had the cement plant been operated in the last preceding years, he answered: That he was not an operator of a cement mill; that it has been the practice in the past that the heaviest operation has been through the summer months; that this has been due to many other conditions entering into it, that is, the quarry and the economy of daylight and those conditions enter into it rather than the [210—118] power. He was asked if this would change any when they had their new plant. He answered: That the daylight would be the same and the demand for cement would be the same, but the cement mills can adjust themselves to the power available to their advantage very readily. He was asked what would be the object of the cement plant with a possible load of twelve hundred or thirteen hundred kilowatts that might be used at the mill, what would be the reason for using only one load and not drawing the water from the plaintiff's side of the river? He answered: That the 120 second-feet which they had estimated and figured would be the total passing over when they were maintaining 1068 elevation at the point of diversion, is not sufficient additional power to make up the deficiency which would be required to carry the mill to full capacity.

Asked if there were 120 second-feet behind plaintiff's reef (C–C), and the cement company were operating its plant and needed the water, would not its plant automatically take it? He answered:

(Testimony of Floyd W. Allen.)

No, that there were too many constrictions in the canal and headgate at that stage of the river, with forebay and canal lowered. That he had figures as low as 700 second-feet, it had never really been that low. He was asked referring to Exhibit "K," if it was not true that the Geological Survey Records showed the water stage from 500 second-feet stage up? He answered: If the river has ever been that low, he failed to find note of it in any records he had seen. That up to the summer of 1925, the lowest record was 770. Since that date it had been down once to 748 in July, 1930.

He was asked to state what there was in the construction of the works, including the canal, that would keep the cement plant, with a demand for fifteen hundred kilowatts and a flow in the [211—119] river of 700 second-feet, from drawing that pondage off of Lots 1 and 2, and answered: If we have a demand for fifteen hundred kilowatts at the cement mill, and only 700 second-feet in the river, we could not generate it. He was asked if they could not draw off what water there was above or behind where he was to maintain the elevation of 69.1 and answered: That it would only last about ten minutes; would not last very long, did not know exactly how long it would. He said it would not be practical to do it. He was asked whether in the operation of the plant, when the power would be drawn down at the cement mill, it would automatically draw the pondage off of plaintiff's land? And answered: No, not necessarily (referring to Plaintiff's Exhibit 7, Defendant's Exhibit "B")

(Testimony of Floyd W. Allen.)

because the bottom of the canal would be at an elevation of 1064 at Station 19 plus 50. This is at the entrance to the flume nineteen hundred feet south from the headgates. The approximate elevation of the bottom of the canal would be 1063.5. The flume at this elevation will have an elevation at the above of 1061, and will be approximately one-tenth lower at the power-house, or 1060.9. He was reminded that he was explaining why it was not practical to draw into the turbines more water, and answered: When the water is at an elevation of 1069, the forebay is approximately one foot less, the forebay being immediately above the power-house and below the flume. The water in the forebay will rise. The water in the forebay at 700 second-feet of flow in the river, the water in the forebay will be 1068.7. That will limit the cross-section area of the flume to a capacity, or practically the limit of 700 second-feet, less the 120 second-feet. He said he meant 770 second-feet less 120, which would be 650 second-feet. [212—120]

His attention was called to the fact that there would be no obstruction if the shattered area were taken out. There would be no obstruction above the headgates of the canal to interfere with the drawing down of the pondage through the canal into the power plant. And answered: That there would be no obstruction above the headgates. He was then asked whether that as far as the practical operation of the plant is concerned, when the demand is made at the cement mill for a large amount of power, would it not immediately and automati-

(Testimony of Floyd W. Allen.)

cally demand more water, and draw it from the pondage above the gates in through the canal? And he answered: If two machines were operating. He was asked if they were not going to have the two machines there, and he answered they would both be there. He was then asked if they were both there to operate, would the operation not draw this pondage from Lot 1, and around the wing-dam and down through the shattered area and into the canal? And answered: Would automatically shut one down, that they did not necessarily have to operate it. He was asked whether it would be a practical operation of the cement mill, when the water was available and needed, to shut one machine down. He answered: "Not when you need the power but according to the power we can generate."

He was asked if they then left the other unit in, could not they generate the additional power that they wanted, and whether this would not be done in the practical operation of the plant, and stated: That he thought it would be very impractical to expect to increase the power, manufacture power for a very short period of operation, which would only be an aggravation to the mill. In other words, an increase of power for a period of an hour or so would not do any good to the mill. Asked why then [213—121] they had the two units, he said: To be able to generate the maximum power during the season of the year that they need it, when they can generate it. He said that the power varied through the day slightly, but not very much. That the cement mill is not a very fluctuating load.

(Testimony of Floyd W. Allen.)

Nearly all the machinery is under constant load, except where the fine grinding comes in. If they are only grinding eight hours a day, then there is an increased load during that period. He stated that it would be physically possible with a plant constructed as contemplated, to operate at a surface elevation at a point below 69. (Tr. 250.)

He stated that to get the maximum amount of power, the canal would have to be deepened over and above what is contemplated, the headgates would have to be enlarged and the flume would have to be enlarged. He was reminded that he had been asked about the maximum amount of power, and whether it was practical—whether it would be physically possible without changing the canal, etc., to operate at a lower water surface than 69. And answered: But there are a great many complications that enter into that question. That he could not answer it offhand he did not believe. He was then asked: Is it physically possible to operate at 67? And answered: If the plant is designed for such, yes, but as it is, no; because the stages of the river would be the one controlling factor, with the designs as they are that would prevent—and the size of the canal and the size of the flume and the entrance to the turbines themselves.

Asked at what stages of the river he thought the water would have to be to permit operation at a water surface elevation of 67 at this point where it is claimed that they are to maintain an elevation of 69, he said: Well, the stream flow itself has never

reached as low an elevation as 67. With the diversion completed or partially completed, as proposed, it would be practically impossible to [214—122] withdraw it at any such elevation.

Asked what would keep the cement mill, with the demand for power, with two units hooked up, from drawing down to 67, he answered: Capacity of the headgates, capacity of the canal, capacity of the flume, and entrance to the flume, and entrance to the turbines themselves, are all factors in controlling the water that may be drawn. He said that he maintained that to divert 700 second-feet, the canal would have to be deepened.

He was then asked that, assuming that they were operating the two units and at a flow of 770 second-feet, and at a surface elevation of 69, and the cement mill pulled a heavier load, would not that pull down the surface water elevation? He answered: That it would pull it down momentarily if you have to maintain that load. Asked if it would not keep on pulling it down, he answered: No, because the canal and flume are limited in cross-section area, as you reduce the height you reduce the maximum area. In other words, you reduce the water in the height of the flume by two feet, you decrease the cross-section area and in terms of engineering, your hydraulic radius increases, and you increase the water that may flow down the canal and flume. That if you were operating with 770 second-feet and more power was used, it would not draw down the surface elevation below 69. Not materially.

(Testimony of Floyd W. Allen.)

He was asked what is to keep the other water from the pondage above from being drawn down, and answered: It would just be a matter of filling the canal up, and this drawn down momentarily but would not be of any duration, and would not affect the water surface above the point of diversion materially at all. [215—123]

He stated that after the shattered area were removed, there would be no obstruction between the gates at the head of the canal and the upper river. That the water there would be just the same as any other water; that it would seek its level. He was asked then, if you had a large demand drawing more water into the turbines, is that going to pull on this water the same as it would on any other water? And answered: That it would, and there is also water going down the river all the time to replace that which is taken out.

He was asked: But according to the demand at the cement plant are they going to draw down below 69 at that point? And answered: No, not materially. It was suggested to the witness that in their answer that this blasting was done in order to take all of the 1347 second-feet available. And that in his former testimony in this case, before Judge Bean, if he had not answered that they intended to take all of the 1347 second-feet that could be made available? And answered: Yes. He stated that Judge Bean had asked him about the construction of the plant, and if, when it was constructed it was to take that much water, and that he had answered affirmatively. He was asked if

(Testimony of Floyd W. Allen.)

he now said that a plant with said capacity for drawing the water through there and the water in what might be called the forebay, back of the canal, clear on up the river, that it would not have the capacity to draw the amount of 1347? And said: I do say that. He explained his answer by saying: In my previous statement I made the statement that the canal was designed to carry 1347 second-feet when the stages of the river were at 1477 second-feet, allowing 120 second-feet to pass down the east channel, that that is the total.

He stated that in the natural condition of the river, as [216—124] prevails upon the east, there is 120 second-feet going down that channel. That if they maintain an elevation of 1069, it would still leave 120 second-feet passing down the channel.

The following occurred:

A. Let me take any cross-section here.

COURT.—Referring to what?

A. Sheet No. 4, Plaintiff's Exhibit 7, our Exhibit "B." Taking typical cross-section six plus 00, on Sheet No. 4, and produce the water surface that would exist on river stages—when the diversion would cause a river stage at point of diversion of 1069, as all shown in red now.

Q. You meant that up the river at the point you mentioned before?

A. Up the river. If a river stage that would create an elevation in the canal, would be less head in the headgates of .55 flowing at 1350 second-feet, which would produce surface water in the canal at

(Testimony of Floyd W. Allen.)

this station of approximately 1068.45. If the canal was drawn below 1067—is that what you want?

A. 1068.

A. If the river stage is 1068 in the river, would be approximately 1067.5 in the canal, which would be a loss of sixty square feet of cross-sectional area, and a material increase of the ratio of perimeter of wetted area to the total sectional area, which would decrease the flow of the canal. That same logic holds good in the flume as well.

Q. Then what you are trying to illustrate is that although your canal is constructed to take the 1347 second-feet, when the river is down to stage of 700 second-feet, you couldn't [217—125] draw a couple of hundred more second-feet from the pondage above there, and put through the canal?

A. No. As a matter of fact, every point and every stage of the river, I have not calculated the exact amount.

He was asked if he had a canal that would take 1347 second-feet, and he was operating with the river stage at 700 feet, and desired to draw 500 feet more, could he put this 1200 second-feet through the canal? He answered: They have lost the effective head which is created at the headgates, which would permit the increase of the volume of water through the canal. He stated that if you reduce the headwater at the stream—at the point of diversion you automatically reduced the head.

He was asked if when the pondage was drawn down, suppose more water is drawn, whether it comes from the pond or from a cloudburst, or else-

(Testimony of Floyd W. Allen.)

where, and answered: It would go through the canal. Asked if it would make just as much water if the 1347 feet were coming through the natural flow? He stated that the canal has not a capacity of 1347 second-feet when the natural flow of the river is only 700 because the effective head is not that great. In other words, the cross-sectional area of the canal and flume is based upon the required area that would be given; when the river stage is 1347 second-feet, it is approximately one foot higher than 1069, or an elevation of 1070.

He was asked if he had 700 second-feet and somebody turned some more water in, making 1347 second-feet, would the canal carry it, and answered: Yes. Asked if he had the same additional water, and it came from pondage, would the canal carry it? He answered: When the river is only at 700, the river stage—the river stage at this point without any draft would be 1069, and with the flume and all the gates closed, would be approximately 1070.5. That is, with the canal closed and diversion as we planned. [218—126]

Asked if he was trying to hang it on to some changes to be made by the use of the gates to control the amount of water that entered the canal, he answered: No, that he was not hanging it on to the use of the gates, except that the construction itself has reduced the head by a certain amount under given conditions from the waters above the headgates to a point in the canal itself; there is the loss of head there which is absolutely fixed. Asked if in the operation of the plant he intended to fluctuate

(Testimony of Floyd W. Allen.)

the surface elevation from 69.1, he answered: "Very slightly."

He was then asked what there was to keep the water from being drawn down if they were using more power? He stated: Starting at the wheels and the total opening of the gates att he turbine, your limits of your flume gates leading to power plant limit your canal.

Asked if he was going to keep somebody at the headgates to regulate them? He answered: No, because the fluctuation of the river is not rapid. Asked if it was not true that the only way he could keep the surface elevation at 69 and keep the flow in the river constant, was to keep the demand for power at the cement mill plant constant he answered: That that would help the situation materially. Asked if that were not the only way he said: No, that he would not say that was the only method because you could absolutely control the amount of water that would go through the turbines by shutting down the governor to a point where a certain amount of water would enter its wheels. Asked if this would not be practical when you needed more power, he answered: Yes. That power at the cement mill could be regulated along—and harmonize with that power which can be generated at the wheel. The two harmonize together [219—127]

Asked when the man at the cement mill, some eight thousand feet distant, needs to turn on some 500 more kilowatts, is somebody to run down to the plant and close the gates on the turbines, whether that is practical? He answered: They are all

(Testimony of Floyd W. Allen.)

closed down due to low water, you could not turn them on by throwing extra load on. Asked if that would restrict the load, he answered: Yes, it would restrict the load. Asked if he would want that to be done in practical operation, he answered: That they were particularly willing to do it in this case because they could regulate the cement mill and adjust the manufacture to meet the power available. Asked if it would be practical not to take the power when it is available and by just automatically turning on the power, he said: That to draw on the pondage was very impractical because it is of no particular consequence; it is limited in area, and very shallow in depth.

He testified that when the wing-dam should be completed there will be no return of water below the reef C–C to the plaintiff's property. That the point of return of the water is below the plaintiff's property. That there would not be any return of water across the wing-dam below reef C–C, to the plaintiff's side of the river at low stages, nor would there be any at a stage of 1347 second-feet. Asked if this would then dry plaintiff's Lot 2, he said: With the exception of 120 second-feet flowing by it. He stated that they were not intending to put any control gates on the head of the canal except for the purpose of protection against sudden floods or foreign substances entering the canal, or things of that kind. That there would be no automatic control gates; just controlled by hand.

Asked if they intended to use either of these units of their electric plant as a sort of a stand-by plant,

(Testimony of Floyd W. Allen.)

[220—128] to operate the two together, the witness answered: That they would operate the two at once when they could, when they had the demand for power. That at other times the other unit would act as a stand-by, in case of breakdown, or something of the kind. (Tr. 261.) [221—129]

FLOYD W. ALLEN, redirect examination by Mr. KOLLOCK. (Tr. 261.)

The witness was shown

DEFENDANTS' EXHIBIT "N" FOR IDENTIFICATION.

He testified that it is the certified copy from the State Engineer's office of permit No. 3275 on file therein on behalf of the defendant city for 147 second-feet. Also permit No. 7942 which is for 980 second-feet. The exhibit was offered in evidence. It was objected to that there was no proper foundation laid, incompetent, irrelevant and immaterial as to the particular question under investigation, namely, the right to blow up the bed of the stream at a point where the blasting was done and remove rock therefrom; that the State Engineer has no judicial powers; that the plaintiff has never had its day in court upon these permits and that they are mere options for a right to use water. Attention was called to the fact that they are not final water rights,—that the certificates have not been issued upon any of them, and Mr. Kollock stated that he did not claim that they were final rights or had certificates issued thereon

DEFENDANTS' EXHIBIT "N" ADMITTED.
(Tr. 263.)

for such weight, if any, as the court may give them upon final determination of the case.

Mr. Kollock called the court's attention to the [222—130] fact that the permit originally issued on the 28th day of February, 1917, for the 147 second-feet provided for actual construction work to begin on or before February 28, 1918, and it had been extended to June 1, 1920, which continuances bringing it down to June 1st, 1933, and complete application of the water to the proposed use should be made originally October 1, 1926, now extended to October 1, 1933. The permit had full maps as they existed at the time attached thereto.

Mr. Kollock stated that the permit had been for 147 second-feet; that from this 25 second-feet had been sold but this is not indicated by the permit.

Mr. Kollock stated there was also application for permit 7942 based upon application for 980 second-feet with permit issued that limits thereon the actual work shall begin on or before May 26, 1932, and be thereafter prosecuted with reasonable diligence and completed on or before June 1, 1933; that it is noted thereon "the theoretical horse-power given above is based on 1300 second-feet of water. Total water appropriated and applied for includes the above 980 second-feet plus 220 second-feet with priority of 1899 and 147 second-feet with priority of February 20, 1917, total 1347 second-feet,—25 second-feet of the 147 second-feet have been released

to the Gold Hill Irrigation district,—balance of water considered waste and leakage."

The defendant then offered in evidence certified copy of the decree in the matter of the adjudication of the waters of Rogue River and its tributaries, entered in the Circuit Court of the State of Oregon for Jackson County and duly certified to by the County Clerk of said county and called special attention to the entries at the bottom [223—131] of column 2 on page 3 of that decree (printed decree), —entries are as follows:

> "NEILSON AND McCLURE (W. L. McClure agent) Gold Hill, Oregon, proof 27, Volume 1, priority 1879, 75 second-feet for power (250 horse-power) Braden Ditch; water to be returned to stream at or immediately below the place of use. Description of place of use, lot 3, Section 15, Township 38 South of Range 3 West of W. M., Jackson County, Oregon,

and the following entry:

> OREGON WATER AND POWER COMPANY, Gold Hill, Oregon, proof 30, Volume 1, priority 1899, to 220 second-feet for power (750 horse-power); power canal; water to be returned to the stream below place of use; description of place of use, diversion in Northeast of Northwest of Section 15,—place of use in Section 15, Township 36 South of Range 3 West of W. M., Jackson County, Oregon."

Counsel stated that he would have further documentary testimony concerning the present claimant

(Testimony of Floyd W. Allen.)

to these rights that both parties go to which was adjudicated by chain of title.

Plaintiff objected to the introduction of any evidence on the 75 second-feet and as a basis for that objection inquired of the witness where the point of entrance (place of use) of this water,—this 75 second-feet according to that decree which says lot 3, of Section 11, Township 36 South of Range 3 West of Willamette Meridian,—where is that point with reference to the property in controversy?

The witness answered that section 11 is the section immediately north of Section 15, upstream from Lot 1 and on the east bank of Rogue River. Plaintiff's counsel [224—132] objected that the water is not in controversy here; this water is under decree and must be returned above Lot 1 and therefore if it did have rights, it would be part of the waters that belonged to its land and not water that can be used on the opposite side of the river in this diversion that is planned in this case.

The court reserved ruling. The defendant renewed their offer of the decree of adjudication and the court said it would be received and the court would take under advisement the objections that had been made.

It was marked

DEFENDANTS' EXHIBIT "O"—DECREE.
(Tr. 266.)

Defendants' Exhibit "O" is a printed copy of a decree entitled "In the Circuit Court of the State of Oregon for Jackson County. In the Matter of the

Determination of the Relative Rights of the Various Claimants to the Waters of Rogue River and Its Tributaries, above the Mouth of the Illinois River, in Jackson, Josephine and Curry Counties." This printed decree is printed with three columns per page, covering 73 pages and eighty-four numbered paragraphs. It is dated April 26, 1919, and bears the certificate of the Clerk of said court that it is a true copy. It contains the following provisions:

"IV.

"That the following named persons, firms, associations, and corporations, although duly and regularly notified as required by law of the commencement of these proceedings and although afforded opportunity to present their respective claims, and to be heard herein, have failed and neglected to appear in these proceedings, or to submit or offer any proof herein of any right, title, interest, or claim thereto, in or to the use of, or the waters, or flow of the waters of said Rogue River or any tributary thereof involved in these proceedings; that the said persons, firms and corporations hereinafter named being in default herein, as more fully appears from the findings of fact of the State Water Board herein, are hereby declared to be in default, and are not entitled to any right, title, or interest in or to the waters involved in these proceedings, nor any part thereof, nor to any riparian rights, rights by appropriation or prescription or otherwise in respect to the diversion or use of said waters or any thereof, or to appear herein and subsequently hereto assert any right, claim to, or interest in, said waters,

or any of them, acquired, initiated or owned by them at or prior to the time of the commencement of these proceedings; and each of said persons, firms and corporations shall be, and hereby is, forever barred and estopped from hereafter asserting any rights heretofore acquired upon said Rogue River or any of its tributaries embraced within these proceedings, and shall be held, and hereby is declared, to have forfeited all rights to use of the waters herein involved, if any he had prior hereto, theretofore claimed by him; the persons, firms and corporations so being in default herein being as follows, to-wit:" (Following the words: "to-wit:" is a long list of names of persons, companies and corporations, alphabetically arranged. The names of the following companies or corporations do not appear in the said list of parties served and against whom default was entered as stated in said paragraph IV:

Prospect Construction Company.
Rogue River Electric Company.
Siskiyou Light and Power Company.
Condor Water and Power Company.
California-Oregon Power Company.
The California Oregon Power Company, plaintiff).

In said Exhibit "O" also appears the following provisions:

"V.

"That the persons, firms and corporations named in the tabulated statement of rights hereinafter set forth as entitled to rights of appropriation of the waters herein involved, owning or being in posses-

sion of lands bordering on said Rogue River or any tributary stream herein embraced, have at all times used, and claimed the right to divert and use, said waters by virtue of appropriation thereof, and have waived any riparian rights they or their predecessors in interest may have had or claimed to the use of said waters which may have heretofore attached to or been appurtenant to their said lands.

"VI.

"That in accordance with the findings of fact and order of determination of the State Water Board herein, both original and supplemental, as modified by this court, it is hereby determined, adjudicated, ordered and decreed that the following claimants and appropriators named in the following statement of their respective and relative rights have appropriated, and are entitled to the use of, the waters of the stream herein embraced under which their names appear, as of the priority date and to the extent set forth in said statement and that each of said claimants is entitled to, and shall have issued to him, water right certificate or certificates, according to law, in accordance with said statement, defining, establishing and confirming his title and right to the use of the waters of the particular stream or streams herein embraced to which he is hereby decreed a right, as set forth in said statement. That the name and postoffice address of each such appropriator of the waters of Rogue River and its tributaries herein embraced, together with the date of relative priority of each such appropriation, the maximum amount of such appro-

priation in cubic feet per second of time, in continuous flow, throughout the irrigation season herein fixed, the number of acres to which each irrigation right hereby confirmed is appurtenant, the use or uses for which said appropriation was appropriated and is now applied and to which such use is limited, the name of the ditch or ditches through which such appropriation is diverted, and a description of the lands to which such water right is appurtenant, set forth under the particular stream from which such appropriation is diverted, are as follows, to wit:"

Following the words "to-wit:" is the heading: "Rogue River." Under this heading there were introduced in evidence the following portions of said decree.

"NEILSON & McCLURE, (W. L. McClure, Agt.) Gold Hill, Ore. (Proof 27, vol. 1); Priority 1879; 75 second-feet; for power (250 horse-power); Braden ditch; water to be returned to the stream at or immediately below the place of use; Description of place of use: Lot 3, Sec. 11, Tp., 36 S. R. 3 W. W. M., Jackson County, Oregon."

"OREGON WATER & POWER CO., Gold Hill, Ore. (Proof 30, Vol. 1); Priority 1899; 220 second-feet; for power (750 horse-power); Power Canal; water to be returned to the stream below the place of use; Description of place of use: Diversion in NE¼ NW¼; Sec. 15; place of use in Sec. 15; Tp. 36 S. R. 3 W. W. M., Jackson County, Oregon."

"CALIFORNIA-OREGON POWER COMPANY, a corporation (Successor to Rogue River Electric Company), Medford, Ore.; Priority Aug. 5, 1902; 1560 second-feet from Sept. 1 to June 1

(Testimony of Floyd W. Allen.)

of each year; 1060 second-feet during June, July and Aug. of each year; for power (2600 horsepower); 10 second-feet additional for operating fish ladders; Gold Ray Canal and Dam; right limited to use of water and return thereof to stream at present point of return, below the power plant; See further Paragraph 11 of this decree; Description of place of use: Gold Ray power plant in S½ Sec. 18; Tp. 36 S. R. 2 W. W. M., Jackson County, Oregon."

"CALIFORNIA-OREGON POWER COMPANY, a corporation, (Successor to Prospect Construction Company), Medford, Oregon; (Proof 31, Vol. 1); priority October 8 1904; 150 second-feet for present use for power; right to increase to not to exceed 400 second-feet, upon compliance with provisions of paragraph 12 of this decree; Prospect Flume; water diverted returned to stream at Power House; Description of place of use: Prospect Power Plant in W½ NW¼; Sec. 6; Twp. 33 S., R. 3 E. W. M., Jackson County, Oregon."

The defendant then offered in evidence for all purposes as a part of defendants' case what was originally Plaintiff's No. 1 for Identification herein and the same was received and marked

DEFENDANTS' EXHIBIT "P" (Received).
(Tr. 266.)

The witness Allen was asked what the exhibit is and stated that it is an amendment of the plans of development filed with the State Engineer's office on April 8, 1931. It amends Sheet 1 and Sheet 2 of the former maps we filed in the State Engineer's office as shown in Defendants' Exhibit "B."

(Testimony of Floyd W. Allen.)

The witness testified that Defendants' Exhibit "B" indicates the condition of the records as they appeared in the State Engineer's office at the former trial of this case. [225—133]

The witness said that Defendants' Exhibit "P" indicates the filings since the last hearing, bringing them up to date.

The defendants then offered in evidence deed of conveyance from the Sheriff of Jackson County to W. L. McClure, covering the interest of Neilson in the water right designated in column 2, page 3 of the decree and it was marked

DEFENDANTS' EXHIBIT "Q." (Tr. 268.)

Mr. Reames offered to stipulate with reference to the ownership of property involved, but counsel proceeded.

Mr. Newbury offered a deed of conveyance from W. L. McClure to the City of Gold Hill to cover the same property, which was received and marked

DEFENDANTS' EXHIBIT "R." (Tr. 268.)

He offered a certified copy of the conveyance from the Oregon Water and Power Company to the Rogue River Public Service Corporation covering lots involved in this controversy and water rights in connection therewith marked

DEFENDANTS' EXHIBIT "S." (Tr. 268.)

He also offered a deed of conveyance from Robert F. Maguire, who was Master in Chancery in the United States District Court of Oregon, covering the same property to Newton W. Rountree, which was received and marked

DEFENDANTS' EXHIBIT "T." (Tr. 268.)
[226—134]

He offered a certified copy of a deed of conveyance from Newton W. Rouhtree to Irrigation and Power Company, marked,—received and marked

DEFENDANTS' EXHIBIT "U." (Tr. 268.)

He offered a certified copy of a deed of conveyance from Irrigation and Power Company to City of Gold Hill, which was received and marked

DEFENDANTS' EXHIBIT "V." (Tr. 268.)

He stated that all of these exhibits were certified copies. In addition he offered a certified copy of a patent issued by the United States to Francis Marion Fredenburg which he said covered the lots now claimed by the plaintiff in this case, which was received and marked

DEFENDANTS' EXHIBIT "W." (Tr. 269.)

Vol. 12, Page 625.

UNITED STATES OF AMERICA To FRANCIS MARIAN FREDENBURGH.

To all to whom these presents shall come Greeting:

Homestead Certificate No. 1761.

Application 2839.

Whereas There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Roseburg Oregon,

whereby it appears that pursuant to the Act of Congress approved 20th May, 1862. "To secure Homestead to actual settlers on the Public Domain, and the Acts supplemental thereto, the claim of Francis Marion Fredenburgh, has been established and duly consummated in conformity to law, for the lots, numbered one and two and the East half, of the North East quarter of Section fifteen in Township 36 South of Range 3 West of Willamette Meridian in Oregon containing one hundred and fifty acres and forty hundredths of an acre, according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor General.

Now Know Ye, that there is therefore granted by the United States unto the said Francis Marion Fredenburgh, the tract of Land above described. To have and to hold the said tract of Land, with the appurtenances thereof, unto the said Francis Marion Fredenburgh, and his heirs and assigns forever: subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. In testimony whereof I Grover Cleveland, President of the United States of America have caused these letters

to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the 20" day of April in the year of our Lord one thousand eight hundred and eighty five and of the Independence of the United States, the 109th.

(Seal)

By the President—GROVER CLEVELAND.

By M. McKEAN, Sec'ty..

S. W. CLARKE,

Recorder of the General Land Office.

Recorded *Volum* 5, Page 66.

Filed and Recorded Feb. 6, 1886. W. H. Parker, County Clerk.

For Affidavit see Vol. I, page 243, Misc. Records.

[Endorsed]: U. S. District Court District of Oregon. Filed May 1, 1931. G. H. Marsh, Clerk. E-9126—4/23-31.

No. 6874. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 18, 1932. Paul P. O'Brien, Clerk.

It was objected to upon the ground that no proper foundation had been laid, and it was incompetent, irrelevant and immaterial, and the Court ruled that "They are all in evidence subject to the objection."

Continued Examination by Mr. KOLLOCK.

Mr. Allen produced a brown print of the tracing that had been introduced in evidence and it was substituted for the original tracing.

(Testimony of Floyd W. Allen.)

DEFENDANTS' EXHIBIT "I." (Tr. 269.)
[227—135]

The brown print was marked as Defendants' Exhibit "I."

Counsel for the defense stated that some question had been raised as to whether the map from which the tracing was made had been introduced before. The witness testified that it was in court,—was identical with the one in court and substituted for the tracing. He stated it was introduced in the first case before His Honor Judge Bean at Medford and bore the file-mark of October 17, 1928, marked Defendants' Exhibit "R" in Equity Case 8991, the case which went to the Court of Appeals.

It was admitted in evidence and marked

DEFENDANTS' EXHIBIT "X." (Tr. 270.)

The witness testified that the tracing had been slightly changed as to the plan for the diversion dam at the uppermost reaches of the river.

Mr. Reames offered in evidence what was Exhibit "S" in the case that went to the United States Circuit Court of Appeals, E.-#8991. It was marked

PLAINTIFF'S EXHIBIT 20 FOR IDENTIFICATION. (Tr. 271.)

The witness Allen testified that this is an exhibit in the former case,—shows the Rogue River at point in controversy from the headwaters upstream to the north line of Section 15 and it shows the,—it was

(Testimony of Floyd W. Allen.)

taken from the survey of August, 1926, and no changes on it; that the markings in yellow are the estimated quantities of water passing through the various channels and openings in the river when the river is at the river stage of 1069.4 [228—136] at the point of diversion and the river has a total discharge of 770 second-feet. He stated that a portion of the marks in yellow are referring to elevations at the point in question,—meaning surface elevations. It bears handwriting of the witness placed there during the taking of the testimony and as a part thereof.

FLOYD W. ALLEN resumed the stand for recross-examination, April 30, 1931 (Tr. 273), by Mr. REAMES.

Mr. REAMES stated: "With reference to the decree for 220 second-feet, I have here the proof of claim upon which that was based, and I have here the original record from the County Clerk's office at Medford, which I found in the files of one of the old cases, and which ought to be back in the County Clerk's office. A very valuable document, Volume 1 of the Water Rights Statements and Adjudications of Waters of the Rogue River, and am bringing this record here simply for identification if no objection.

Mr. KOLLOCK.—Received without objection.

Mr. REAMES.—I am offering this proof of claim 30 in the Water Adjudication upon which was based the decree for 220 second-feet."

Marked PLAINTIFF'S EXHIBIT 20½. (Tr. 273.)

Plaintiff's Exhibit 20½ is proof of claim filed by Oregon Water and Power Company, an Oregon corporation, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries, and is designated as claim No. 30, Volume 1 (Proofs of Claims) and is the proof of claim referred to in Defendants' Exhibit "O," page 3, column 2. This Exhibit "O" is a certified copy of the decree of the Circuit Court of the State of Oregon for Jackson County, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries. This proof of claim, Plaintiff's Exhibit 20½, is the one referred to in column 2, page 3 of the Decree of Adjudication wherein 220 second-feet were adjudicated to said Oregon Water and Power Co. and which portion of said decree of adjudication was read into the evidence in this case.

Exhibit 20½ is a document upon forms submitted by the State Engineer in adjudication proceedings and is entitled:

"BEFORE THE BOARD OF CONTROL OF THE STATE OF OREGON

"Water Division No. 1

"Jackson, Josephine and Curry Counties

"In the Matter of the Determination of the Relative Rights to the Waters of the Rogue River and Its Tributaries. Water Diverted from Rogue River Through Power Canal Ditch.

(Testimony of Floyd W. Allen.)

"Statement and Proof of Claimant."

The proof of claim states that it is in the name of Oregon Water and Power Company, an Oregon Corporation, for waters out of Rogue River for power development; that the date of the initiation of the right is October 30, 1899, made by posting notice and recording same, certified copy of which notice is attached. The notice attached is one signed by J. J. Houck, locator, for 300,000 miner's inches of the waters of Rogue River, and the copy is certified to by the County Recorder for Jackson County, Oregon. The claim states that the water is to be used for power development. The claim is for 1485 cubic-feet per second of the waters of said stream for the manufacture of 5062 theoretical horse-power, through a diverting dam in the Northeast quarter of the Northeast quarter of Section 15, Township 36 South of Range 3 West; water to be conveyed by canal to the center of Section 15 for power-house equipped with turbines and generator and then returned to the river near the center of said Section 15. To the proof of claim is attached a blue-print showing a diversion dam across the river and a canal paralleling the river to the power-house at or near the bank of the River.

The witness Allen was asked whether he intended as [229—137] a part of defendants' plan of construction to blast any additional area in the river other than as has been blasted. He stated that as far as he knew at the present time he did not think they intended to blast anything further except the trimming up on the site in question, but

(Testimony of Floyd W. Allen.)

that they intended to remove the material that was shattered. The witness' attention was called to Defendants' Exhibit "P" and to the red letter "A" at the arrow down at the lower portion of the exhibit and he was asked what the area in the heavy line indicated. He stated that the heavy line indicates the shore line as existing at the present time. He was asked what indicates the amount that he proposes to excavate and stated there is nothing there indicating the amount proposed to be excavated except the westerly line of that area; that the heavy line merely indicates the shore line as existing up to date. He was asked to state how much he proposed to excavate at the point marked with a red letter "A" and the arrow from the words "This area to be excavated 6 feet below low water or an elevation of 1063.5 plus or minus," and said that the present contemplation is an area 30 feet in width extending from the north end of the first island from the west bank, and running southwesterly a distance of approximately,—in the neighborhood of 220 feet all told and 30 feet in width with the exception of an additional area taken out between the first island and the original mainland 20 feet in width.

He was shown Plaintiff's Exhibit 13 and asked whether he marked that there in red and stated "No." He was told that Mr. Olsen had testified that he (Olsen) had platted the description which the witness Allen had given in the former trial of this case as the ground which defendants intended

(Testimony of Floyd W. Allen.)

to excavate; that he had platted it on [230—138] this Exhibit 13 and marked it in red and this witness was asked whether it approximately indicated what they intended to remove and said that there is a previous description which he corrected to conform with the territory which he intended beginning at a point south 420 feet from the quarter corner between sections 10 and 15, Township 36, South of Range 3 West; thence west 10 feet to a point of beginning. The point of beginning he marked "A" in blue on Plaintiff's Exhibit 13,—thence south 20° west 220 feet to point marked B on Plaintiff's Exhibit 13, thence southeasterly along the western bank of the river a distance of 45 feet to a point marked "C," thence north 20° east 190 feet to a point marked D, being the northwest corner of the first island from the west shore of the river, thence north 70° west 30 feet to the place of beginning.

He was also asked to indicate thereon what additional area he intended to remove and answered an area approximately 20 feet in width which was largely embodied in the channel between the first island and the mainland as existing before blasting, —this diagonal strip was a point thirty feet southerly from the northeast corner of the first described land, thence southeasterly approximately 40 feet to deep water on the west channel of Rogue River, thence along the shore line and to a depth of 6 feet in a southerly direction to a point on the west bank of Rogue River and at a distance of approximately 25 feet, thence northwesterly approximately along

(Testimony of Floyd W. Allen.)

the original shore line of the west bank a distance of 30 feet and to the easterly line of the first described tract, thence north along the easterly boundary of the first described piece of land, to the place of beginning.

Asked how much additional area is there described from what was intended to be described in the former trial [231—139] he answered aproximately 20 feet for an average length of 30 feet on a diagonal; that practically none of it is off of the first island; it is a channel that existed between the first island from the westerly shore and the original mainland of the Rogue River. He said it was his understanding that the holes were drilled and shot a depth of 5 feet below low water; that they are going to that depth although they may probably have to go to 6 feet but it was only shot 5 feet.

At the court's request the witness marked the last described area hachured in blue that he had just given data upon by the letter "E" in blue; that this is all to be down to about the same elevation. Asked how this compared with the floor level adjoining it he stated it will compare on the average,—be about the average,—there are deeper spots in the west channel than the 6 feet mentioned in that area.

He was asked how far it is from the easterly portion,—he said it is about 18 feet east of the original bank of the stream; on that bank; that the original bank is shown by the dotted line on the exhibit.

(Testimony of Floyd W. Allen.)

He was asked to refer to the place marked "E" and from there to the bank of the river and to tell what that distance is which was called the upper or eastern portion of the tract marked "E." He answered that it was approximately 18 feet from the original bank of the river.

Redirect Examination by Mr. KOLLOCK. (Tr. 278.)

The witness, attention was called to the legend on the exhibit reading "This area to be excavated below low water at an elevation of 1063 feet" with an arrow point above it. He was asked to what area this referred,—what [232—140] is intended to be delineated by that area,—this area,—and stated it limits the area to the letters east of the line drawn from and shown as from A to B on the original map and shown in dot and dash line. The witness said that it was his impression that the matter of filing with the State Engineer's office regarding any right so far as filing is concerned is to give them the privilege of removing all that portion that they see fit but not intended to indicate actual intention of excavation but merely reserving the right.

Recross-examination by Mr. REAMES.

The witness stated that the heavy line is the shore line existing under present conditions by reason of the blasting and throwing loose rock over into the channel and into the stream causing more land to appear now than existed prior to the blasting.

(Testimony of Floyd W. Allen.)

He was asked if they were claiming the right to take out this land east of the red line that you have shown there for excavation and he answered that he did not know, as he was claiming that they had the right to remove what obstructions they deemed necessary to accomplish the construction of the power plant "we have in mind" if it requires all of the removal of that land within that area.

The witness was asked to indicate on the exhibit the portion that he intended to take out or remove and answered: "for the present time we do not intend to take up as far as that,—no we don't contemplate taking anything further than the area shown within the described tract of land plus the [233—141] area shown in blue marked as 'E.'"

Attention was called that he had filed this map with the State Engineer for the purpose of having the right to take out more if he desired and he stated that he did not see any necessity of limiting themselves at this time so far as the State Engineer's office is concerned. His attention was called to the fact that the plaintiff was on the other side of the river and desired to know what their intentions were and he said, "Well, I think I stated my position there,—in other words we intend to take out the thirty foot area as described plus the diagonal strip at this time and no more. If my chance (meaning "by") this is not sufficient we would like to reserve the opportunity to take out additional width in order to divert our quantity of water which we plan.

(Testimony of Floyd W. Allen.)

He stated that he figured on this removal of this blasted area in accordance with the quantity of water that they were going to take. He said that the area to be removed was practically 60 feet wide,—55 feet wide at a point about mean way between the northerly and the southerly portion marked by the line L–M in red. (Tr. 281.)

TESTIMONY OF JOHN WHITE, FOR DEFENDANTS.

JOHN WHITE, called as a witness for the defense, under direct examination by Mr. KOLLOCK, testified:

That he lives at Grants Pass, Oregon; is a registered professional engineer; has practiced about 23 years; has been city engineer at Grants Pass for 6 years; prior to that time he was in Colorado about 15 years, then went to California, New Mexico, Texas, Nevada, Idaho, and the [234—142] State of Washington; that he had been called upon professionally to make surveys for the defendants on Rogue River. Was first employed August 12, 1926, under instructions of Mr. Muirhead and Mr. Floyd Allen, engineer; under these instructions he made a complete survey of the region of Rogue River in this case including elevations at various points; and made a map and gave the information to Mr. Allen; that he has been in attendance at a number of trials in this case in one form or another in which many maps and blue-prints have been introduced in evidence by the defendants; that all of these maps

(Testimony of John White.)

have been based upon the original survey which he made; that the elevation 1,069 referred to is based upon his survey; that it means an elevation approximately above sea-level, meaning that instead of going to the Government mark to get his start he used a bench mark that had been established by County Engineers of Jackson County; that he checked the elevation in this bench mark later back to the Government bench mark at or near the depot at Gold Hill and that it agrees with the approximate elevation stamped on the bench mark by the Government. He said, now the approximate,—the Government,—for instance,—when they establish this bench mark the party at the time stamps the elevation that they make it on the cap that is on the bench, and as I understand it they just put the nearest foot; and later when they close their circuit they have a correct elevation which varies sometimes just a few,—from just a few inches to a foot. When I speak of approximate elevation, that is what I mean,—approximate elevation above their sea-level.

He stated that the Government records showed the elevation of 1,056 higher than the mark they have on the [235—143] bench mark now at Gold Hill. That all of the elevations shown in his survey and on the maps based thereon and offered in evidence are based on the same bench mark to which he had referred.

He participated in the measurement of the waters of Rogue River flowing in various channels about September 26th, 27th, and 28th, of 1930, and with Floyd Allen; that he never made any measurements

(Testimony of John White.)

before 1930; that he assisted Mr. Allen in measuring the current and volume of water flowing through various openings in September, 1930.

He measured it by using a Gurley Electric meter and a K. & E. mechanical meter for determining the velocity. They checked one against the other to be sure there were no errors in the work. He testified that he heard Mr. Allen's testimony as to the result of the measurements and they were correct. That at the time he made the survey he didn't know what use,—what was to be involved,—what it would develop into and he made the survey taking into consideration everything he thought was important at that time and never made any what would be called real cross-sections of any part of the stream until 1930; that in September, 1930, he took a cross-section of the portion of the river referred to as the reef along C–C in Plaintiff's Exhibit 9 in company with Allen and he thought two or three helpers and that Mr. Muirhead was there part of the time. They made the soundings in this manner: Picked up a line just above the reef,—a few feet above the reef; as near as they could determine the shoals, they had the shallowest water above the reef and they got the elevation of the bottom at the breaks as near as they could determine,—that is, the low places and the high places. [236—144] Asked if at that point it did actually go into the water, he answered,—right out into the water; had a rope tied to the rodman and anchored to the boat.

Asked how deep the water was about at the point

(Testimony of John White.)

where they measured he said the lowest elevation they got was 1066; that the depth of water on that reached about 3 feet or 3½ feet at the deepest place,—that he could see the bottom in various places, the water being clear, and see the bottom condition across where the work was being done. He was shown Defendants' Exhibit "F" and asked whether it contained correct measurements taken across the river at the time mentioned and he answered that it was a cross-section that Mr. Allen made from their notes take at the time and correctly represented it as far as he could tell,—that he didn't make it. He said that this work was done September 28, 1930; that since that time he has not had occasion to make any measurements exactly at that line. But in that vicinity he had on the previous Sunday taken a few elevations in the bottom along the reef. He was asked to indicate on Plaintiff's Exhibit 13 where the measurements were taken. He stated that near as he could tell the line already there; this little light blue line that is projected across from the point he had marked X with a blue pencil and approximately along this dim line and on a straight line across the narrows as near as he could tell to another point, which he marked with a blue X.

That he made several soundings,—fully a dozen and found several places there that had an elevation of 1066. That from the survey which he made in September, 1930, and this brief investigation which he made on the previous Sunday he thinks that the bottom of the river at that point is approxi-

(Testimony of John White.)

mately the same position as it was [237—145] in September, 1930, as indicated in the graph, Defendants' Exhibit "F."

That he has understood that at an elevation of water above 1066 there would be some water flowing over that reef at the present time; that the measurements which he made at this time he did not do as he had before because the water was too cold and approximately a foot deeper than at the other time. Asked how he made the measurements he,—on this last occasion, on Sunday, he said,—level rod. There was a sort of a bridge built across there made of poles and loose boards from which he worked.

He was shown a photograph

DEFENDANTS' EXHIBIT "Z" FOR IDENTIFICATION

and one marked

DEFENDANTS' EXHIBIT "AA"

and said that they were photographs taken at the site and structure to which he referred at that time. That she thinks the pictures were taken by Mr. Muirhead; that by putting the ruler down in the water they could see the end of the ruler about 5 inches below the surface; that they could see the bottom of the river before,—the water was very clear in 1930. That on the Monday following the Sunday mentioned, the water was still muddy but clearing up.

(Testimony of John White.)

DEFENDANTS' EXHIBIT "Z," DEFENDANTS' EXHIBIT "AA," RECEIVED IN EVIDENCE. (Tr. 290.) [238—146]

Cross-examination by Mr. REAMES. (Tr. 290.)

He testified that the Sunday referred to was the 26th of that month,—April, 1931. That the measurements on the reef that he found to be 66 were taken right along,—there were two poles put across the river approximately 14 feet apart with cross-pieces on them to make a walk through; they took them on the center of the bridge and on the up-stream side of the bridge. Asked how far from the lowest point of the reef they were taken he answered that as near as he could determine these were the lowest points on the reef and not exactly where he took the readings in 1930. That the water was up considerably higher and they took them before in a sort of "V" shape when they could see the bottom and tell how the reef ran. The bridge was built straight across and they just had to work from what was visible and worked there down off of this bridge,—very doubtful if anyone could get a real true section of the high actual part of that reef from the bridge.

Asked how far that was from either end of the bridge,—the west end or the east end, he said that the bridge was approximately east and west; that they started at the west end of the bridge. His attention was called to the fact that he had testified that they had found several elevations of bedrock that were 1066 and that the question was nearest

(Testimony of John White.)

which end of the bridge were these. He answered, —well on that the first one was about 6 or 8 feet out and then—he didn't have the measurement,—he didn't get the measurement at the points; that he was across the river and the rodman was giving the reading to him; that the rodman [239—147] was named Pomeroy in one case and another time Mr. Martin; and Mr. Muirhead and Mr. Pomeroy; that he believed Mr. Muirhead had the rod that time, but that he himself was on the other side of the river,—namely, on the west side; that he was shooting clear across; that they relayed them to him,—no, that he got the readings off of the rod but they tried to call the distances to him and the river made so much noise he couldn't hear them and he lost out on the distance. It was late in the evening and they didn't have time to obtain them and he didn't consider it sufficient,—he just wanted to get the check readings where the bridge was.

Asked by the Court if the men with them called the distances from the bank and he answered they tried to call the distances from the bank and the Court said, "You mean the readings on the level"? and he answered: "No, I got the readings on the level myself."

Asked if the river was so noisy in there that he coudn't hear across the river he answered,—not there I couldn't hear,—that is the reason I didn't have the distances. I didn't have time to go back and get them. It got late and started to rain and I had to quit. I just did it to get a check to see how that point would agree with the work we did

(Testimony of John White.)

before because I knew it was within along the line where we did the other.

Asked what instructions he had given about holding the rod,—how far apart were these soundings to be made by the man holding the rod which the witness was reading, he said he told them to find the lowest places on the upper side. They gave them to him they said about every six inches.

On objection the Court struck from the answer what the [240—148] others had said.

He testified that he was there again Monday afternoon but not Tuesday; that the river was clearing up Monday; Monday afternoon it was cloudy too, but was getting pretty well cleared up; that others were there taking measurements Monday. That just about the time he got there Mr. Warren's and his helper, who were employees of the plaintiff, came up there from down the river. They were quitting at that time; that he didn't see them taking any measurements but they evidently had just quit taking them.

He was shown Defendants' Exhibit "Z" and asked the names of the men in the picture, and he said he thought Mr. Olsen and a crew of men that worked there on Sunday; that on the bridge the man in shirt sleeves he believes is Mr. Olsen,—the other two men he does not recognize. The same answers would apply to the Exhibit "AA."

He said he was a witness in the former trial of this case before his Honor Judge Bean; was there throughout the trial. He said he believed that at

(Testimony of John White.)

that trial there was present Plaintiff's Exhibit 10, which is Plaintiff's Ex. 6 here, and that it was in evidence, including the sheet marked 2 showing all the bedrock elevations of the river at this same point to which he just testified.

His attention was called to the exhibit to the heavy line between stations 21 plus 17 and 19 plus 69.25; and he was asked if the heavy line indicated the surface of the bedrock of the river at that point according to that survey. He answered, just approximately,—that he didn't take any readings in the bottom of the stream that he recalls at that time,—that was just a projected line (Tr. 294). [241—149]

He was asked whether the dotted line on the exhibit indicates the cement that is to be put in and answered I think,—I didn't make that, Mr. Allen made it. He was asked if this map was before the court at that time (the first trial of this case before Judge Bean). He answered yes, sir. He testified that it was the only map that was introduced in the case that showed the elevation of the bedrock at that point.

He testified that he was a witness at the trial of that case in October, 1930.

He was asked whether he testified about having taken any bedrock elevations at that point on the preceding 28th day of September and answered: As I recall there was never anything said or asked about this; that he was not asked, that he recalls, at all,—that he does not believe anyone else was asked.

(Testimony of John White.)

That he does not recall of anybody having testified to these elevations that he is now testifying to that he found on September 28, 1930. He said he did not recall anybody testifying to them, and added, "but I had them." He said: I do not recall that anybody testified to them,—as to the elevations having been taken at that reef.

As to the datum used in computing elevations the witness testified that he had gotten the information originally from the county engineer which checked to within four one-hundredths of a foot with datum obtained from the State Engineer. That the elevations that he gave,—the Government engineer had given to him,—would be 1.056 foot higher than the elevation shown on that bench mark. In other words, the elevation of that bench mark now is 1084 and the elevation as the Government gives it is 1085.056. In other words, add to the figures on the top of the pipe (at the depot) 1.056. [242—150] That the witness used the same datum all the time. That the corrected Government elevation is approximately one foot higher than all of his elevations. That would make his elevation of the bedrock at the bottom of the river which he found to be 1066 read 1067. So that his elevation of 1069 would be 1070, and that the same would be true with the figures taken on September 28, 1930,—so that when he had 1066.4 it is 1067 instead of 66.

That when he was out on the bridge he took about a hundred elevations, which took him about an hour,—he did not keep track of the time. Asked for the record of the hundred shots he said he just

(Testimony of John White.)

had rod readings. Asked where they are, he said: I kept them,—that is, that he just put down rod readings that he made himself, and that from these he found about seven that were as low as 66, which corrected, would be 67; that he knows nothing of the width of these openings that went to that depth. He was asked whether he knew anything of the accuracy of the soundings,—he answered, within an inch and asked: What do you mean, vertical? And when question was: Yes, he answered: within an inch.

Redirect Examination by Mr. KOLLOCK. (Tr. 298.)

He was asked what is the fact as to whether in making the correction of the bench mark it would change all of the elevations to which he had been referring; as 1069 to 1070 and answered, well, it doesn't change the difference in elevation; you can go onto a rock and assume an elevation; just a question of the other elevation of the [243—151] low river bed; if you know the difference between those elevations you know what elevations come from others. The question was repeated and he was asked to answer it and whether absolutely the same results would arise as between the elevations of water and the height of the ridge at the point marked "reef" and answered yes.

Asked if the only point of correcting the elevation is to get the actual elevation at this point above sea-level, he answered yes. Asked if he had before testified that all the measurements to which

(Testimony of John White.)

he had referred at any time or which have been indicated on any of the maps introduced in the trial of the case are based upon his survey and his measurements of elevations are based on the same measurements or bench mark he answered,—Yes, sir.

Recross-examination by Mr. REAMES. (Tr. 299.)

He testified that it would be better for comparison for all to use the same datum and that without knowing what difference is between them it wouldn't be easy to make the comparison. Asked if he had taken these one hundred shots in an hour he answered,—might have been two hours,—he could not recall. He guessed about an hour or an hour or an hour and a half. He thinks that those he took were very accurate. (Tr. 299.) [244—152]

TESTIMONY OF W. H. MUIRHEAD, FOR DEFENDANTS (RECALLED).

W. H. MUIRHEAD recalled as a witness for the defendants, testified upon direct examination by Mr. KOLLOCK: (Tr. 300.)

He stated that the drilling preparatory to the explosions was begun October 16, 1928, and completed November 20, 1928; that the drilling was finished about ten days before the decision in a prior case pending; he testified that he was in charge of the explosions, the operation at the time

(Testimony of W. H. Muirhead.)

that the explosion was made and had charge of it personally.

His attention was called to the drawing that Mr. Allen had identified as the area proposed to be covered,—now included in the blasted area,—and asked whether that covers all the area they proposed to blast and answered it covers all the area that they proposed to blast except such squaring up as might have to be done,—it might be found that there were some jutting points or reefs in the bottom which would have to be removed to permit the free flow of the water.

He testified that on the previous Sunday he was present at the property with Mr. White who was there prepared to take level readings across section C–C, or any other section that might be determined they wanted levels; that by C–C he referred to the location C–C on Plaintiff's Exhibit 9 across the river on the east side thereof; the place being known as the reef; that in making the measurements the witness used the rod that sounded the bottom of the river in taking measurements across that channel on the log that was in the upper side of the cribbing,—the open stream; [245—153] that he used the rod every six inches as near as possible to insert the rod at that place because there was a very swift current; they took six inch intervals with the idea of getting away from any inaccurate measurements that might be developed by the blast,—for instance, a few feet apart when made on the side of the slope or across the ridge; that they missed some intervals of six inches because the planking across the two

(Testimony of W. H. Muirhead.)

logs prohibited them from getting the rod in at that particular interval; that they could not see the river where they were making the soundings; that he personally took the measurements Sunday at about noon and it was possible to see five and five and a half inches in the water; that the depth of the water varied from a few inches down to four feet at the upper log of the bridge; that he checked the visibility on Monday at seven and a half inches about the same time of the day; that he didn't get any information personally on Tuesday; that he had a man check it at 2:35 P. M. and in bright sunlight and he reported it as 35 inches.

The court, upon objection, struck this latter part out as hearsay.

He testified that he was present in September, 1930 during the taking of a part of the readings by Mr. White and Mr. Allen and Mr. Martin, their superintendent and a couple of other men from their plant assisting. The visibility was so clear you could see the bottom at any elevation up to 6 feet in depth; asked why, if he knew that the measurements made in the fall of 1930 were not on a straight line on the river such as those made on Sunday, being more or less V-shape, and answered: our men went over there and waded through the water seeking to find the highest point in the reef and upon covering that area thoroughly they determined that the highest points there [246—154] were going up from the shore line of the center island.

Objection was made that the witness was getting into hearsay and he continued that they waded the

(Testimony of W. H. Muirhead.)

water at that point,—that the witness was in a boat watching the operation and determined that the crest of the reef ran in a northeasterly direction to a point on the island along the line C–C on Plaintiff's Exhibit 9.

That they followed this line for a ways and then turned to the east again. Bottom contours were taken along the section because it was the section representing the highest point in the reef.

His attention was then called to some testimony concerning a dam operated by the plaintiff at Gold Ray and whether there had been made under hi direction a computation as to the elevation of the railroad track above the dam at Gold Ray and answered affirmatively; that it was made by their engineer Mr. Martin and based upon a geological survey bench mark several hundred feet from the dam.

The court sustained the objection that it was hearsay. The witness answered that he did not see any of the measurements taken but he personally measured it in an approximate way Tuesday. As to what he did Tuesday, he said that he measured it at approximately 20 feet from the top of the dam where the water flows over to the rails along the Southern Pacific track; 20.

Asked as to the condition and character of the railroad right of way, whether solid rock or not, he answered: cut through solid granite through that section for half or three-quarters of a mile.

He said that he had been in actual charge of the operations of the defendant cement company since

(Testimony of W. H. Muirhead.)

1919 [247—155] and familiar with all of the details of the operation as they are conducted there; that he is familiar with the electric load as taken for operation and with the peak load of such demand. He was asked whether in the operation of the cement mill there is a constant load, or otherwise. He answered: A cement mill runs 24 hours a day,—the producing part of the mill,—the only parts that would run ten or eleven hours would be some portion of the pressing unit or the shipping department,—also three 10-horse-power motors in the shop. The balance of the plant runs 24 hours a day when it is running, excepting during shutdowns, and our cement plant runs as any other cement plant,—that it is a very flexible unit in which they can operate a half day at a time, but you can operate your clinker producer end, and at our plant, as a great many other plants, this is done for continuous periods of from three to four months, and then at other times you will operate your cement or grinding end for a smaller period with the clinker end shut down. That type of operation is indulged in where the manufacturing company gets some benefit out of operating that way.

That defendant company had been buying power from plaintiff company and it would have been no saving to cement company in the past to have operated that way because the loads would amount to approximately the same thing. There might have been a few dollars per month, but it would not have been sufficient to warrant it in doing that.

He stated that he had available there their records

(Testimony of W. H. Muirhead.)

showing the consumption of electricity through a fixed period of time; that he had them as far back as 1923; that up to the year 1930 the maximum was 1312 kilowatts in one month which was the largest month's production the company [248—156] had even had at its plant. The average for the year would be well under 1100 kilowatts,—that is, the average monthly demand, while the average monthly consumption would run under 900. This was during the month of March, 1930. The minimum was during,—they had 512 kilowatts in June and during July by a statement, it said on the billing "no demand reading as consumption was too small." He said the consumption was low,—80 kilowatts in December,—that was a low month. He said that the demand for cement is in no way connected with the operation of the plant,—that they have storage facilities for 40,000 barrels of cement and often carry clinker storage up to 100,000 barrels and their average shipments for last year were under 20,000 barrels a month; that if they were to develop their own electric power through the proposed plant, it would be very easy from a cement manufacturing point of view to regulate the load so that it would not come heaviest upon the hydro-electric development when the river was at its lowest. Asked how, he answered,—well we rarely start our plant before March every year and we could start about six weeks or two months earlier and produce sufficient clinkers because of the early start to enable us to shut down several months during the middle of the year.

He was shown photograph marked

(Testimony of W. H. Muirhead.)

DEFENDANTS' EXHIBIT "BB" FOR IDENTIFICATION. (Tr. 308.)

and stated that it is a picture representing the stream of the Rogue River at the point covered by the blasted [249—157] area; that is, partially covering the blasted area, and shows the narrows through which they were not passing considerable water and also the cross-channel from the east to west side of the river that they intend to block off with the dam, which necessitates the opening of the blasted area. He stated that the picture was taken in 1928 before the blasting. That it shows the condition before; it shows work being done where they were constructing the old crib; that it has nothing to do with this at all and shows the area very well.

It was received in evidence as

DEFENDANTS' EXHIBIT "BB." (Tr. 308.)

Q. Will you mark on this photograph, if you have something to mark with, approximately the so-called blasted area and the,—first the so-called blasted area?

He answered that it was a little difficult on account of this high point of rock, the contour goes down below there, and the line that I draw will be quite a ways back from the bank of the river,—that this is a high point of rock and the contour drops probably 20 feet,—that he couldn't show it very well there, but here you could.

Attention was called that he had indicated that transverse channel that had been referred to as

(Testimony of W. H. Muirhead.)

reaching out from that and answered: I can mark that on this picture. Marked this channel on Exhibit "BB," "A," and the blasted area as "B." He said, now perhaps I am confused there in the transverse area,—you mean the transverse blasted area? [250—158]

Q. The channel you were blasting out from there.

A. I will have to change that and scratch off the "A" I put on.

Asked to mark the area that he had blasted out he marked it "C," stating: "C" represents the transverse blasted area, "A" represents the cross-channel of water from the east side of the river to the west side of the river which would be blocked off by the proposed permanent construction. That "B" represents the blasted area. He marked the narrows with a letter "D" stating this was the only area that they had at this time that would pass water down the west side of the river, with the exception of the cross-channel "A."

On Plaintiff's Exhibit 13 he indicated the narrows with a letter "W" in red.

At the Court's request the witness marked the point of rock that hides from view a portion of the blasted area with a letter "E" on Exhibit "BB," stating that it hides a small portion of the blasted area on the west bank.

He was then shown

(Testimony of W. H. Muirhead.)

DEFENDANTS' EXHIBIT "CC" FOR IDENTIFICATION. (Tr. 310.)

and stated that it is a view taken from the island on the east side of the narrows at the point marked N, Exhibit 13 looking downstream from that point; that it shows the west channel of the river with the headgates of the power canal in the distance and particularly shows the flow of the water from the east to the west [251—159] of the river that was marked "A" on Exhibit "BB."

DEFENDANTS' EXHIBIT "CC" RECEIVED IN EVIDENCE. (Tr. 310.)

(This exhibit is Defendants' Exhibit "CC." It must not be confused with the line C–C heretofore referred to in the evidence indicating the location of a reef as shown on several of plaintiff's exhibits, —for instance, on Exhibit 2 and on Exhibit 9, etc.)

The witness then identified Defendants' Exhibit "AA" and stated that he took AA about 11.15 A. M. on April 26th, and took "Z" at about 11:30 A. M. on April 27th.

DEFENDANTS' EXHIBIT "AA," DEFENDANTS' EXHIBIT "Z," RECEIVED IN EVIDENCE. (Tr. 311.) [252—160]

W. H. MUIRHEAD, witness for the plaintiff.

Cross-examination by Mr. REAMES. (Tr. 311.)

He testified that he had the power bills rendered to the Cement Company by the plaintiff, from Janu-

(Testimony of W. H. Muirhead.)

ary, 1930, to December 1930, and testified that they showed the monthly kilowatts used by the Cement Company as follows:

January,	512 kilowatts
February	1168 kilowatts
March	1312 kilowatts
April	1280 kilowatts
May	1256 kilowatts
June	512 kilowatts
July	none
August	1248 kilowatts
September	1240 kilowatts
October	1120 kilowatts
November	704 kilowatts and
December	80 kilowatts

That there was a range of from nothing to the maximum. It depends upon how much of the plant they operate; that they only operated half of it for a number of months, and that they operate the entire plant for probably two weeks of some months. If they decide to start up on the 15th of the month, their demand would be high for that month, and the consumption wouldn't be proportionately high. That hence the figures could be confusing.

His attention was called to his testimony where he had said that the cement company should operate twenty-four hours a day and said: Part of the time. The demand is very regular and uniform per day, but from the power company's monthly billings, it would not indicate to you it was. Asked if it were not quite a fluctuating demand, ranging from nothing to 1312 kilowatts, he answered: That is was

(Testimony of W. H. Muirhead.)

not; that he had some readings taken by the plaintiff as the demand of their mill, if we would [253—161] like to hear them. That they were very enlightening. He suggested that Mr. Emery took them, and he would give them. Asked if their electrical plant was to be built only for the manufacture of cement, he answered: That it was built primarily for the manufacture of cement, but that the company had a contract with defendant city to supply it with twenty kilowatts free, and any additional that it might want at one cent per kilowatt; that the company had opportunity in addition to that, unless stopped by the utility, of selling to any other customer that might be developed in that territory. And they would do that should the customer present himself.

When his attention was called to the fact that the pleadings show "not a public service" he answered: Wasn't that the question you asked, depends entirely on the service? He stated that the cement company could operate the plant solely for cement use, but naturally if it had an investment there, it would want to make the best use of it it could, and should business be such some year that they could sell only fifty per cent of their usual amount of cement sales, and the mill would be down proportionately lower, and they could find an outlet for their power, they would certainly sell it.

Concerning the railroad track and the Gold Ray dam up the river some four or five miles from the point in controversy, he stated that he did not want to be understood as saying that the company had a

(Testimony of W. H. Muirhead.)

right to raise that dam twenty feet, but just a reasonable percentage of that, probably sixty per cent of the twenty feet. That he did not know that they had the right, but that they might acquire it. It is an opportunity there to rehabilitate the old plant they have there. Asked if this did not involve the question of eminent domain between two utilities, he said: [254—162] That he would not attempt to testify as to how it could be gotten.

As to the readings of bedrock elevations that were taken on September 28th, 1930, he took none of these himself. He was simply on the ground while this was being done. That it was being done from the water in the stream, and an engineer on the bank. That he only verifies the readings that he took on Sunday. But as to those taken in 1930, he verified those be believes a short time ago by telling how they waded in the stream to find the highest points in the reef; that is all.

He stated that he was a witness in the former trial of this case, and present throughout the trial. Asked whether he testified to any readings having been taken at the reef, he answered: No testimony of that nature was presented in the case; it was never an issue. The only issue in that case was the cubical volume of the water flowing over a given point, and the contour at the bottom of the river, but no other was an issue. Asked whether or not he did on the stand at that time identify sheet marked "2" of what was then Plaintiff's Exhibit 10 (now Plaintiff's Exhibit 6), where the elevations of the river bottom is shown to be 68.2, he said:

(Testimony of W. H. Muirhead.)

That might have been offered as an exhibit to show we had plans filed with the State Engineer's office, but that as to a specific reference to Sheet 2, the contour line shown at the bottom of the sheet, he did not believe that was referred to by himself or anyone else before. That it is correct that that particular portion of the exhibit had been designed as a part of the plans for crossing the river in a previous condemnation case. (Tr. 316.) He did not recollect that he had identified any sheets. He identified the assembled sheets as being the plans.

For the purpose of refreshing his memory, he was asked to refer to page 2, as having been marked by the reporter, from the top of it, as page 3 of that Exhibit 10. It was pointed out that there is a large sheet 2, and there is the Exhibit 3 at the top of it. He answered: That in any event, it shows being made in [255—163] September, 1926, and didn't attempt of course to show the bottom of the river in 1930.

His attention was called to the fact that the first page had been made in 1930; that this was pointed out at the time; that this profile of diversion dam at the bottom of Sheet 2 was marked at that time as Exhibit Number 3 on the then Exhibit Number 10, now 6, and he was asked if that were not the fact?

Mr. Kollock asked by whom it was pointed out, and it was stated that it was pointed out by Mr. Reames. The witness answered: That might have been the case, my memory is not thorough on that, but I do know that no elevations of river bottom

(Testimony of W. H. Muirhead.)

were referred to, nor did I attempt to state what they were.

His attention was called to the fact that when he was put on the stand by the plaintiff at the beginning of this trial, and the plaintiff's counsel pointed this same sheet out to him, and pointed to the elevations there, and asked if any changes had occurred to change that, he stated that he did not recall, but the facts could speak for themselves.

The following questions and answers were then given:

"Q. You did not anyhow in your examination on the first day of this trial, whatever the record shows that was, you did not say anything about having been present when any river bottom elevations were taken in 1930, September, 1930?

A. No, I wasn't asked that question; no, sir."

He stated that on the Monday, previous to the giving of this testimony, he had spent a couple of hours at the property in question, being there at intervals; that he was there in the morning on the east shore, and took pictures and took some pictures from the west shore, and was back there in the evening when Mr. White concluded his survey. That on Sunday he sat there and [256—164] watched the engineers taking measurements for probably two hours. Was away to the mill for a couple of hours, and back again for a couple of hours more. He was there he would say four to four and one-half hours on Sunday. That he was working with Mr. White about an hour and a half on Sunday, handling the rod all of the time except when one of the other men

(Testimony of W. H. Muirhead.)

went over and took several readings which was about twenty minutes before they began to take theirs. "I think he made three or four shots when the other gentlemen were holding the rod."

Redirect Examination by Mr. KOLLOCK. (Tr. 318.)

The witness identified Defendants' Exhibit "D" as a statement as to the load test of the cement company in 1926, given him by an officer of the plaintiff. In response to the witness' request, made to Mr. Wm. M. Sheppard, of the plaintiff company to have such a test made. It was presented to the witness with the result of the test made.

He said that the test was made to determine just how much of a load in excess of their normal running load was required to start the plant, that probably being indicative of the varying loads that are spoken of at the cement mill. That the report goes through and shows—it shows the two departments of the cement plant that witness has spoken of that are possible of being run at various seasons of the year; it shows the demand of these separate departments; it shows the total demand of the plant. He read from it: "A test was made with everything shut down and then started up as rapidly as possible duplicating as near as could be the conditions that would be obtained after a power interruption." [257—165] He stated that they had a number of men stationed in their mill, and they started all the motors of the plant as quickly as they could at a given whistle. The demand was 940 kilowatts for

(Testimony of W. H. Muirhead.)

the fifteen minute average, reading by F. D. Emory, whom witness thought was a meter man or tester for plaintiff. The maximum demand from starting the entire plant from a standstill was 940 kilowatts by the meter. That this shows starting demand to be less than the regular monthly demand. The exhibit was received at Tr. 319.

The entire judgment-roll in case Number 3098 in this court, the one in which the decree was entered in 1911, was offered and received in evidence as

DEFENDANT'S EXHIBIT "EE." (Tr. 320.)

In the Circuit Court of the United States for the District of Oregon.

No. 3098.

CONDOR WATER & POWER COMPANY, a Corporation,

Complainants,

vs.

GOLD HILL CANAL CO., a Corporation, and OREGON WATER & POWER COMPANY, a Corporation,

Defendants.

R. G. SMITH and J. E. FENTON, Attorneys for Complainant.

PLATT & PLATT and GEO. H. DURHAM, Attorneys for Defendants.

MEMORANDUM DECISION.

BEAN, District Judge.—The pleadings raise an issue as to the quantity of water to which the defendants are entitled, but no evidence on that point was offered by the complainant, nor was it referred to at the argument. I therefore conclude that the defendants' claim as set up in the answer and sought to be supported by notices of appropriation given in evidence is, for the purposes of this suit, conceded. Neither was any question made by the complainant as to the right of defendants to maintain a dam across the river as they and their predecessors had been wont to do for many years. The only disputed question on which any evidence was taken was the right of the defendants to extend their dam over complainant's land on the south side of the river. As their right to do so is based upon prescription and not deed, their right of occupancy cannot extend beyond the limit of the land actually occupied by the old dam. Joy v. Stump, 14 Ore. 361. The evidence all shows that the south end of the dam as maintianed since the early 80's was at or near to what is referred to by the witnesses as "the old crib" while at the time of the commencement of this suit, the defendants were building cribs and doing other work preparatory to the construction of a dam which would extend about 200 feet south of that point, and over and across complainant's land. The land between the end of the old dam and the south end of the (192) proposed new dam has never been occupied by the defendants or their

predecessors in interest and clearly no right to use the same has been acquired by prescription. The complainant is therefore entitled to a decree enjoining and restraining defendants from constructing or maintaining a dam or other structure on its land south of the south end of the old dam, and one to that effect may be prepared and submitted for signature.

Filed February 27, 1911.

[Endorsed]: No. 6874. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 18, 1932. Paul P. O'Brien, Clerk.

It was stipulated that all the annual filing fees required by the State Engineer's office have been paid by the City of Gold Hill on applications.

TESTIMONY OF HARRY OLSEN, FOR PLAINTIFF (RECALLED IN REBUTTAL).

HARRY OLSEN, recalled for the plaintiff in rebuttal:

(Questions by Mr. REAMES.)

He testified that he was present throughout the entire first trial of this case. (The one before Judge Bean in October, 1930.) That at that time nothing was said, nor was any evidence introduced concerning any measurements taken September 28, 1930, showing the bedrock elevations of the reef C–C. That in the trial of that case, the elevations that were used were the elevations shown as 1068.3, as shown on [258—166] the map that the defend-

(Testimony of Harry Olsen.)

ants had filed with the State Engineer. (Plaintiff's Exhibit 10 in the former trial and Plaintiff's Exhibit 6 here.) That he did not take any measurements of the reef prior to that hearing for the reason that they took the elevations so shown as being correct.

That on April 26th, 27th, and 28th, of 1931, the witness took measurements of that reef. The days were Sunday, Monday and Tuesday. Mr. Warren, the instrument man, Mr. Fleet, the rodman, and two helpers, Mr. Webster and Mr. Champion assisted, and on Tuesday morning Mr. Boyle was present. That the flow of the river on those days was right around 1490 second-feet. That on Saturday afternoon, on the 25th of April, two sixty-five foot poles with necessary planking were installed across the reef designated as C–C, on Exhibit 2, for the purpose of being able to make an accurate measurement of the reef in question.

He was shown Plaintiff's Exhibit 21 for Identification (Tr. 322), and said it correctly showed the condition of the water and the bridge that was so constructed for the purpose; it shows the water flowing over the reef and the bridge constructed for making the measurements. The picture was taken April 26th, 1931, Sunday and received as

PLAINTIFF'S EXHIBIT 21. (Tr. 322.)

That the bridge is sixty-five feet long. That the bridge did not cover all the water that is from the center of the river to the east shore; additional

(Testimony of Harry Olsen.)

planking was necessary in order to get to it. He said that first they ran a tie line, together with elevations over to the island in the center of the river so that they would be able to occupy a point averaging from fifty to seventy-five feet from the reef in question. [259—167]

The instrument man was within that distance so that he could hear them; hear what distance they called to him, and also enable him to read very accurately the elevations from the rod. That they took measurements along this bridge at the lower pole, and three feet up stream, five feet up stream, seven, nine and twelve feet from the down stream pole, and that they did that, took those first—these measurements on Sunday, and then went into the office and platted up the results; that it showed a general tendency where the controlling features of the reef would be. With this information they went out Monday morning, and subsequently Tuesday, and took and traced out on diagonal lines, and lines normal to the bridge, and lines parallel to the bridge, the exact location and elevation of the controlling features of the reef itself. In taking this, these elevations, we recorded the results: Generally on foot breaks, that is, a foot long. In some places half a foot and between those foot marks, the witness personally used a steel rod and line rod in feeling ahead or along the line, and felt along the bottom between each foot mark to determine the general contour of the bottom, so as to be sure that they could not miss any sudden or abrupt breaks. That it was done

(Testimony of Harry Olsen.)

with great care, and that in all they took over 450 readings, and this was done over a period of three days, probably utilizing in all ten or twelve hours.

That he made a tracing showing the results of that work and it was identified as

PLAINTIFF'S EXHIBIT 22 FOR IDENTIFICATION. (Tr. 324.)

He was asked to point out the reef and elevations that were taken, and said: That he referred to the rock island [260—168] in the center of the river that is located where designated in this location, and the east shore of the river is shown on the east shore. The direction of the flow is indicated by the arrow, and this is the plan of elevations taken over the reef. The lower pole was along this lower line.

He was asked if he meant bridge, and answered: The bridge from which we operated, and the upper one along the upstream line of figures as shown. These elevations shown as 69.5, 69.3 indicate 69.3. That is, we have left the tenth off. That these are the true elevations above sea level, based upon bench mark of the United States Geological Survey Bench Mark at Gold Hill depot, which true elevation is 1085.056. This is the corrected bench mark.

He testified that he used the true level; not the one shown on the depot; 1084. shown. That he added on to the one shown on the bench mark 1.056 feet, making the actual bench mark 1085.056. After taking these elevations which show here all in a line nearly, the witness said: That he platted these up and determined the general trend of the controlling

(Testimony of Harry Olsen.)

feature points of the reef. That they then went out the next day, and placed lines where they figured the controlling points would be, and took again,—that is where they had not taken before, very accurate measurements. As shown on the exhibit this controlling line, a, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p, is not made up of just two lines. It is made up of quite a number. It naturally would be impossible to have the controlling points of the reef just nicely made up to show two straight lines. It follows certain breaks and deviations which are apparent in the bedrock formation. And this is all to scale, five feet to the inch. Above, on this exhibit, we have shown a cross-section taken along this line to these points, and designated, namely: a, b, c, d, e, f, g, h, i, j, [261—169] k, l, m, n, o, p, and it shows what the lowest points would be. As a matter of fact, we found no point on the controlling reef at elevation, or below the true elevation of 1067.3.

He stated that on Mr. White's notes would be 1066.7, a difference of practically one foot for all practical purposes. He said that the .056 is way on the other side of decimal point. It is true that we found elevations which would compare with the 1066, but they were outside of the controlling reef itself. (Bottom of page 325, Tr.)

Asked what he meant by "controlling line," he said the line as designated from "a" to "p" that he calls them controlling because they control the amount of water which will flow over the reef itself.

As to the one elevation which he found low, he

(Testimony of Harry Olsen.)

stated that it was just at one point. For instance, it shows up between h and i. It is really a little crevice in the rock. That it was not more than a foot wide on top, depending on the elevation that you came to. For instance, from elevation of 68 it would be approximately seven-tenths of a foot wide at the top.

Asked by the Court as to how much space there is on the blue line, he answered: This is an inch. That represents five feet. Each small division faintly shown represents a foot. On this end I have shown the scale. For instance: Elevation: This represents 1065, and this 1067 elevation, etc.

The Court said I mean from here to here, and he answered: That would be 3.3. The Court: 3 and 3/10. Answer: three feet four inches.

The Court said: And across the corresponding line right here? Answer: One foot eight inches. [262—170]

The Court asked him to designate the points, and he said: The first question I will designate as the distance between "a" and "b"; the second question I will designate as the distance between "c" and "d." At the Court's suggestion he marked all of the letters prime (′), a′, b′, c′, d′ in red pencil on Exhibit 22.

Asked if the one that he called as being below 68 was the only one that he found on the controlling reef; he answered: That is the only elevation found below 68 on the controlling reef. He said here is one "c" and "d" that is right at 68. He stated

(Testimony of Harry Olsen.)

that he meant according to the United States base, or true base.

He stated that this cross-section as shown from "a" to "p" is really a stretched out, you might call it, line representing the control of the reef. This line is 1070. That would correspond with the 1069 used in other computations.

He stated that at a surface water elevation of 69, there would be in the low place mentioned an area of about forty-six square feet of water which, at the velocity shown on Mr. Allen's drawing, Exhibit "F," of two second-feet, would amount to around one hundred cubic feet a second flow. And at 68 water surface elevation in their calculations, the area drops down to a little below five square feet; using again the velocity of two cubic feet per second, would make about ten cubic feet per second discharge.

Asked if at the times when such quantities of water were being discharged through that opening, there would be any water [263—171] going over any other portion, he answered: No. That it would just be going through the two small openings amounting to five square feet in the river. He stated that he had platted the reef on a map corresponding to Plaintiff's Exhibit 2, for the purpose of showing the location of the reef C–C. In addition to that he had made Plaintiff's Exhibit for Identification Number 23. He stated that Exhibit No. 23 is the same exhibit as Exhibit 2, with the exception that the outline of the reef, the controlling portion

(Testimony of Harry Olsen.)

of the reef has been marked on the drawing and designated as "a" to "p," meaning it is a, b, c, etc., to p, along with the legend and an arrow as follows: "Outline of reef as located April 26, 27, 1931. See detail plan and cross-section on map S–5266," which is Exhibit 22. He stated that this reef had been platted according to the survey to which he had just testified.

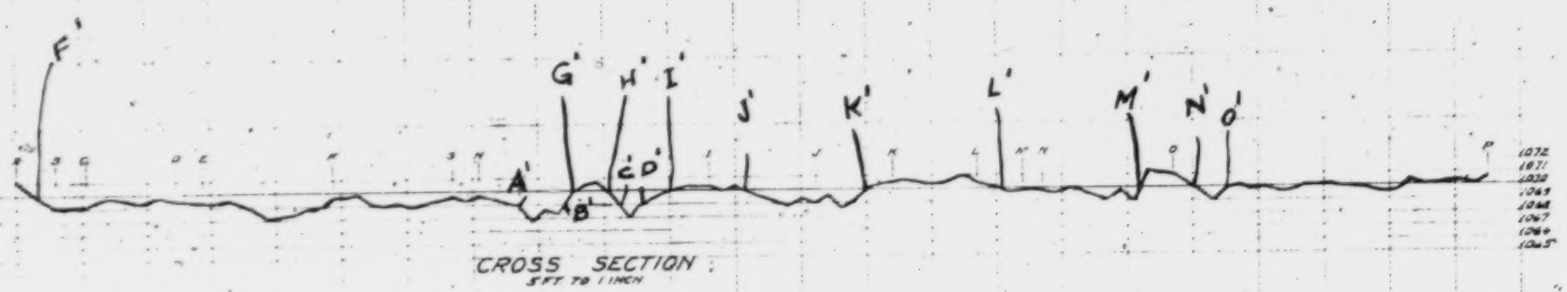
The two exhibits were received in evidence as

PLAINTIFF'S EXHIBITS 22 and 23. (Tr. 329.)

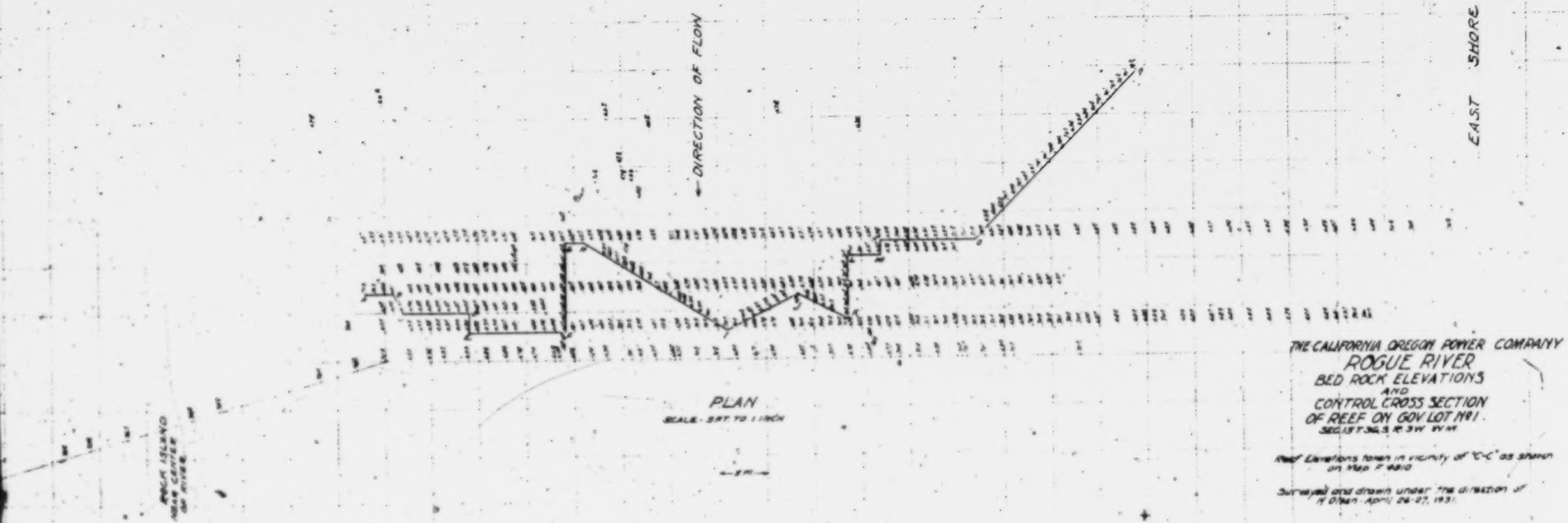
U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
MAY 1 - 1931

PLAINTIFF'S EXHIBIT NO. 22

Note USGS Elev 1070 = Allens Elev 1069



CROSS SECTION
5 FT. TO 1 INCH



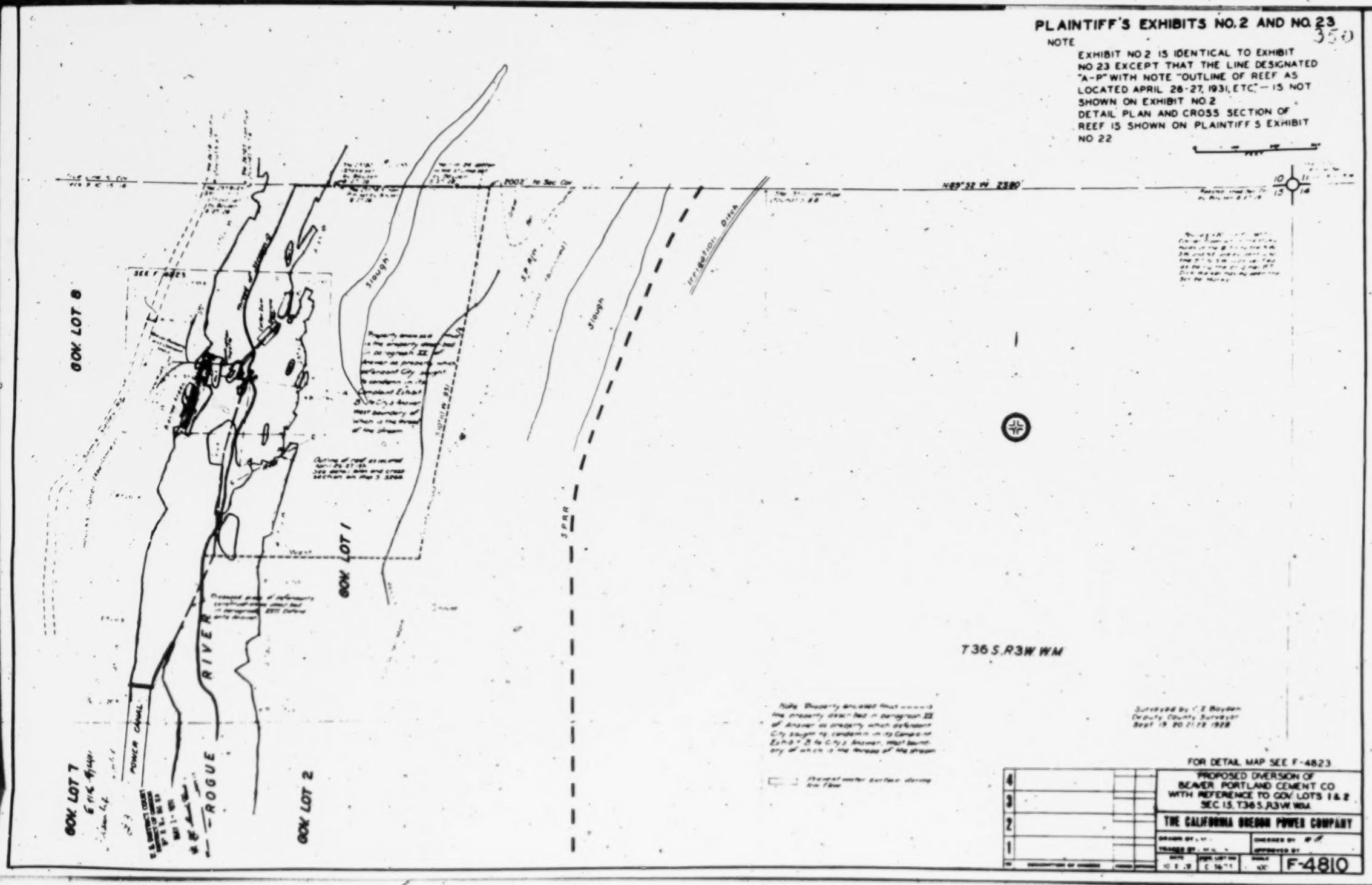
PLAN
SCALE - 5 FT. TO 1 INCH

THE CALIFORNIA OREGON POWER COMPANY
ROGUE RIVER
BED ROCK ELEVATIONS
AND
CONTROL CROSS SECTION
OF REEF ON GOV. LOT NO 1
SEC. 13 T. 36 S. R. 3 W. W.M.

Reef Elevations taken in vicinity of 'C-C' as shown on Map F 4810

Surveyed and drawn under the direction of H. Olsen April 26-27, 1931.

S-5266


PLAINTIFF'S EXHIBITS NO. 2 AND NO. 23
350
NOTE
EXHIBIT NO 2 IS IDENTICAL TO EXHIBIT NO 23 EXCEPT THAT THE LINE DESIGNATED "A-P" WITH NOTE "OUTLINE OF REEF AS LOCATED APRIL 26-27, 1931, ETC." — IS NOT SHOWN ON EXHIBIT NO 2
DETAIL PLAN AND CROSS SECTION OF REEF IS SHOWN ON PLAINTIFF'S EXHIBIT NO 22
N89°52'W 2380'
2002' to Sec Cor
GOV. LOT 8
GOV. LOT 1
GOV. LOT 2
GOV. LOT 7
SEE F-4823
Slough
Slough
Irrigation Ditch
S.P. R.R.
S.P.R.R.
ROGUE RIVER
POWER CANAL
T36S.R3W.WM
FOR DETAIL MAP SEE F-4823
PROPOSED DIVERSION OF BEAVER PORTLAND CEMENT CO WITH REFERENCE TO GOV LOTS 1 & 2 SEC 15, T36S.R3W.WM
THE CALIFORNIA OREGON POWER COMPANY
F-4810

(Testimony of Harry Olsen.)

He was handed Plaintiff's Exhibit 24 for Identification, and said: It contained the original field-notes which were made on the 26th, 27th and 28th in connection with the survey of the reef. That he had checked them and that they were accurate, and from these notes the maps shown were platted. The notes were in Mr. Warren's handwriting. These field-notes were offered in evidence with the permission that when copied by the Reporter, they might be returned to plaintiff. They were marked

PLAINTIFF'S EXHIBIT 24. (Tr. 329.) [264—172].

Afterwards they were withdrawn from the record, as unnecessary, and explained later herein.

EXHIBITS 25 and 26 (Photographs.) (Tr. 329.)

The witness stated illustrate the manner in which the work was done in the measurement of the bed-rock elevations at the reef. They show Mr. Warren, the instrument man, Mr. Fleet, with the rod, and Olsen with the steel rod feeling the bottom of the river. He stated that early Sunday morning up to 8:30, or 9:00, the water was fairly clear. There were times when it got very muddy, and continued that way throughout the day. That on Monday, the 27th, it was a little better. In the afternoon the visibility was fairly good. Portions of the reef could be distinguished, but on Tuesday morning the river was quite clear, and you could distinguish the outline at the reef, the rocks, etc.

(Testimony of Harry Olsen.)

Attention was called to the testimony that had been given that perhaps the reef had been carried out by a flood. The witness was asked whether the water was clear enough at any of these times that they could distinctly see the reef. The witness stated that they could distinctly see the reef and feel it. The witness was shown Defendant's Exhibit "F," showing the work of Engineer Allen in the same territory, and he was asked whether it [265—173] indicates the care with which Olsen had done his similar work, and he answered: From these cross-sections the way the points are platted, it would indicate that there was no deviation between, say a distance of five feet. In other words, one would gather from this, that the defendants' shots were taken all the way from three—or two or three to as much as five or six feet; that is intervals.

The witness said that naturally we found that it was necessary to take them at closer intervals. He said, in fact Mr. Muirhead, and Mr. White yesterday testified to the fact that they went out on the 26th and took about one hundred shots at intervals of six inches, at three different cross-sections across the reef, or bridge which we had constructed; from this bridge, which is sixty-five feet long, completely over to the other shore, that is, from the island to the east shore; as conditions existed, it is pretty close to one hundred feet, and assuming that they needed to go over a distance of eighty feet, they took three of these cross-sections, that would be 240 feet which,

(Testimony of Harry Olsen.)

at six-inch intervals would amount to 480 shots, which they evidently did not take.

He said he found that the method which he had employed, that is by feeling ahead of the level rod and designating a point, that is by not taking as a rule more than a foot, sometimes a half of a foot, that they would have a true picture of the control of the reef. He said that in order to check their data, the levels were run from the bench mark at the station at Gold Hill, to the reef; the bench mark used at the reef in connection with the survey there. He was asked that in the lowest of these openings that they found on the reef, would there be, or would there not be any water passing if the water-level were reduced from 69 that Allen had said he was going to maintain, to 68? He [266—174] answered: Yes, there would be. He was asked if there would be any if it were reduced to 67, speaking of his figures? He answered: Of his figures, well, practically nothing. Speaking of his (Allen's) figures, there would be practically nothing going down. At one point which, according to his figures was an elevation of 66.7, there might be an area of perhaps three or four inches that would allow a small trickle to come down, which would probably disappear very shortly, but for all practical purposes, there would not be any.

As to the station of Engineer White when his readings were being taken, he was roughly speaking about four hundred feet distant from the rock.

The plaintiff then introduced in evidence stream flow records for definite periods, and bound separ-

(Testimony of Harry Olsen.)

ately. They were put under one number, and the sheets subnumbered. They have separate certificates on each. They were introduced as

PLAINTIFF'S EXHIBIT 27. (Tr. 332.)

At this point the plaintiff also introduced the two photographs, marked *plaintiff's*

PLAINTIFF'S EXHIBIT 25 and 26. (Tr. 333.)

Plaintiff produced

PLAINTIFF'S EXHIBIT 28 FOR IDENTIFICATION. (Tr. 333.)

The witness said it is certified by the office of the Cadastral Engineer, and that it is a township plat of Township 36 South, Range 3 West, W. M. Oregon. [267—175]

The witness said that he had designated thereon in red the point of return to the river of the seventy-five second-feet of water set up in the defendants' answer (meaning the Neilson and McClure seventy-five second-foot adjudicated right). He stated that the plaintiff's Lots 1 and 2 are in Section 15, and he is outlining them with black pencil designated by an arrow pointing to the lots. That this point of return of the Neilson and McClure right is about a mile up stream from plaintiff's lot 1. The map is a copy of a very ancient one, made at a time when Rogue River was called Gold River. (Tr. 333.)

TESTIMONY OF ROLAND WARREN, FOR PLAINTIFF (IN REBUTTAL).

ROLAND WARREN, a witness for the plaintiff, in rebuttal.

(Questions by Mr. REAMES.) (Tr. 334.)

He stated that his age was 33; his residence Klamath Falls, Oregon, his occupation surveyor, with more than nine years in that occupation; has been in the service of the plaintiff company seven years and four months.

He was with Mr. Olsen at the dates mentioned when they were making the examination of the reef called C–C on the map. He stated he ran the instrument and recorded the notes which were in his handwriting, and that they correctly show the readings which were taken at the time, and were checked by both Mr. Fleet and Mr. Olsen. He testified that the work was performed in the same manner as had been described by Mr. Olsen on the stand. That the work was done very carefully and accurately. That the [268—176] figures shown are correct. That the readings were taken Sunday, Monday and Tuesday, the 26th, 27th, and 28th of April, 1931. That the river was clear in early Sunday morning, and Monday afternoon it began to clear up again. Towards evening it was fairly clear; Sunday a bit of the reef could be seen. Tuesday morning it was practically clear and you could see very well then. He testified that they took over 450 readings. There were 121 to 123 at

points designated as controlling. He thought that all together about ten hours was used in taking shots on the reef.

The plaintiff here introduced

PLAINTIFF'S EXHIBIT 29 (Tr. 337),

a certified copy of judgment-roll in the original condemnation case brought by the defendant City of Gold Hill against the plaintiff to condemn a portion of Lot 1.

The plaintiff by agreement put in evidence

PLAINTIFF'S EXHIBIT 30 (Tr. 337)

which is a typewritten statement, showing the certain dates as to when various suits were started between parties over this property, etc. It covers the dates concerning the litigation pleaded in the answer.

Plaintiff's Exhibit 30 is a stipulation between the respective parties hereto entered into at the trial (Tr. 337), and contains the following:

"IT IS HEREBY stipulated by and between the parties hereto, in accordance with the understanding had at the trial of the case, that this stipulation could be made to take the place of evidence establishing the facts herein agreed to; that the suit in the Circuit Court of the State of Oregon, for Jackson County, by the City of Gold Hill against the Plaintiff herein, for the condemnation of nine (9) acres of Lot 1, described in the complaint, was begun in that court on the 5th day of October, 1926. That final judgment was entered therein

(Testimony of Roland Warren.)

for the defendant on June 13th, 1928. That on September 13th, 1928, the plaintiff herein in suit No. E–8991 filed its complaint in this court against the defendant in that case, City of Gold Hill and the defendant Beaver-Portland Cement Company. That this case went to final decree in this court on the 20th day of December, 1929. That on the 26th day of July, 1930, the plaintiff instituted this suit."

Cross-examination by Mr. KOLLOCK.

He stated that these readings on the reef were taken at intervals of every foot, and sometimes every half foot; at [269—177] every foot if the contour was more or less even, and then Mr. Olsen felt along between these foot marks, and if there was any jog in the contour of the river up or down—(interruption).

Q. If he found a lower point between the next foot measure he would have another reading at the low point in between. Do I understand that?

A. Not uneven surface—wherever it jogged.

Q. Or is low? A. Or is low.

He said that they would follow Mr. Olsen's direction as he ascertained the fact with the steel rod as to making the next reading. He stated that on Sunday before they were ready to take the reading, the visibility was good, but they could not see the bottom at the time of the taking of the readings on Sunday morning. That then they could see only a few inches; that it was a little bit better Monday morning. You could see the bottom only in places.

(Testimony of Roland Warren.)

Monday afternoon the water cleared up considerably. They took readings Monday afternoon. During forenoon part of the bottom could be seen at different places. Those that came near the surface of the water. He thought that at that time, Monday afternoon, while they were taking the readings, they could see two feet, not so much in the morning. On Tuesday it was quite clear, practically normal, which is very clear. Could see the general outline of the whole reef, except in the very deepest portion. It could not be seen where the water is fairly fast.

Mr. GILBERT FLEET was also present as a witness for the plaintiff, but it was stipulated that his evidence would be the same as that given by Mr. Olsen with reference to the manner and the readings taken. (Tr. 340.) [270—178]

TESTIMONY OF HARRY OLSEN, FOR PLAINTIFF (IN REBUTTAL).

Mr. OLSEN, called in rebuttal.

(Questions by Mr. REAMES.)

The witness stated that at the time of the taking of these measurements on the reef there was in the river a flow of about 1490 second-feet, with about five or six hundred feet flowing over the reef.

The following then occurred: (Tr. 341-2.)

"COURT.—There is one matter I would like to hear something about. It may not have anything to do with it, but I would like to have someone explain, and I would like to have the views of the

(Testimony of J. C. Thompson.)

witnesses on both sides, possibly, as to this amount that that canal takes at the various stages, if it is not already in evidence. The technical engineering data is in, but I don't appreciate the force of it.

Mr. KOLLOCK.—The amount it will take as proposed to be constructed?

COURT.—Yes.

Mr. KOLLOCK.—We will put Mr. Allen back on the stand, and Your Honor can interrogate him just for the questions you want, and if any discrepancies, the other side can do the same.

COURT.—It was touched upon yesterday by Mr. Reames, about the water-level being 69 in the forebay, that I confess I didn't understand the explanation.

Mr. REAMES.—We will endeavor to clear that up." [271—179]

TESTIMONY OF J. C. THOMPSON, FOR PLAINTIFF (RECALLED—CROSS-EXAMINATION).

J. C. THOMPSON, recalled for cross-examination.

(Questions by Mr. NEWBURY.) (Tr. 343.)

He was asked if he was familiar with the plaintiff's properties, and answered affirmatively. He was asked if he could designate on Plaintiff's Exhibit 28 property that the plaintiff owned between that in question and the Gold Ray Dam. He did so, as he said, largely from memory and guess work.

(Testimony of J. C. Thompson.)

He pointed out some pieces of property between the two points, as follows:

"We own one small piece in here in line between the railroad track and the river in Section 11; stated that they did not own the E.½ of the N.E.¼ of Section 11, but did own three-quarters of a mile of river frontage on the north side of the river, and that they had a small piece lying between the railroad track in front of the Walker Ranch."

Witness summed up his answer to the question of ownership as follows: Stating that he was not able to indicate on the plat the property which the Company owned between the property in controversy near Gold Hill and the Gold Ray dam, except generally as follows:

"We own, as I say, that part of the quarter-section lying between the railroad track and the river in front of the Walker place on the south side of the river between lots 1 and 2 and the Gold Ray plant; on the north side of the river we own river frontage of three-quarters of a mile," but witness could not mark it on the map to designate it. Asked specifically as to whether the Company owned the E.½ of the N.W.¼ of Section 11, witness answered, "I think we own that; it is a very irregular piece there, I could not describe it as just that." [272—180]

In further reference to this line of cross-examination, Mr. Reames, having objected to its introduction as incompetent, irrelevant and immaterial, stated, "If they are going to submit, would like to

(Testimony of J. C. Thompson.)

go into the adaptability of it for power purposes; just because you own land, it is no sign it is a power site; if it was, 'there are lots of power sites in the world.' "

Asked when the plaintiff acquired the various rights and properties along here in Section 11, witness stated in 1921, at the same time they acquired the other property, and that he thought they acquired that from the same predecessors in interest as those from whom they acquired Lots 1 and 2.

In reference to the further question, the witness stated that the California Oregon Power Company's present name is "The California Oregon Power Company," and that the predecessor in interest of The California Oregon Power Company, was "California-Oregon Power Company."

There was read in evidence from Defendants' Exhibit "O," portion with reference to the Decree at Gold Ray, showing the point of return of the water from the Gold Ray Dam. The portion was considered read.

It stated: "Right limited to use of water and return thereof to stream at present point of return below the power plant. * * * in S.½ of Section 18, Township 36 South of Range 3 West, W. M." (Tr. 350.) [273—181]

Mr. Kollock stated that he suggested to Mr. Reames that inasmuch as the defendants had no objection to Mr. Olsen's field-notes (Exhibit 24) that the parties stipulate that the tracing was correctly made, as based upon the field-notes in question, and

that therefore the field-notes became immaterial, and may be withdrawn. Accordingly, the record shows that

Plaintiff's Exhibit 24 was withdrawn. (Tr. 351.) [274—182]

TESTIMONY OF HARRY OLSEN, FOR PLAINTIFF (RECALLED—CROSS-EXAMINATION).

HARRY OLSEN, recalled on cross-examination, questions by Mr. Kollock. (Tr. 352.)

The witness' attention was called to Plaintiff's Exhibit 22 and the jagged line thereon and he was asked as to how he arrived at the elevations shown on the profile.

He stated: They were arrived at by taking actual elevations along that jagged line,—for instance, the jagged line represents as you might say the control on the reef; that the controlling points are determined by taking the elevations. They are the highest points in the reef itself and controlling because the highest point would control the amount of water allowed to flow over the reef.

His attention was called to the particular line marked 69.6. He was asked: How do you determine the control line at that particular point? And answered: It doesn't occur at that point 69.6. Asked where the control is, he answered in this case, 69.4,—that runs lower.

He was asked how the point is determined,—point "E" there that you are marking, how is that

(Testimony of Harry Olsen.)

determined? He answered by direct measurements certain distances from this control line and east from there,—that was accurately chained,—measured out at that point gave the elevation of 69.4.

The court suggested to the witness that Mr. Kollock was trying to show, as the Court thought, how [275—183] the controlling points are determined, —how you determine it is going to be the high point.

Mr. Kollock asked: "You took measurements at all these six points on that north and south line, didn't you?" and the witness answered in the affirmative; that he took six measurements on the north and south line at that point. It was pointed out to the witness that he had taken these measurements at various points,—some at one elevation and some at another, and asked how did he determine that the control was at the point which is at "E" rather than another point which is further up, and answered: by connecting the points there as to (interruption,—what points?) answer: At various points by connecting the highest points of the reef.

Asked if it was not true that he had constructed this jagged line by securing the highest points of the six measurements in the north and south line at a point on the east and west line and answered "not exactly."

Asked to explain, he said that he would start over again. That on Sunday they took these measurements early along parallel lines at zero, 3, 5, etc., from the downstream section.

Q. Assuming that these measurements made at the point are the correct measurements at the point

which you have indicated, how do you arrive at these,—when you have platted these points, then how do you arrive at this line? He answered, by connecting the points,—that is, from foot to foot and making a continuous line that will show in effect a barrier or the controlling reef; and all these,—they must be connected, that is to say, the half a foot or foot between. There can be no jumps from one to the [276—184] other so as to leave any open space which might allow the water to pass through there. In other words, this is really a close line and continuous, as you see in the cross-section.

Q. I don't see how you constructed that line unless *connected some* predetermined point; must have determined your point first and constructed the line.

A. Yes.

Q. How do you determine this point through which your line was being constructed?

A. By measuring with a tape measure. I determined them in the field-notes and platted them on here and then connected with this line.

He was asked that after he had made this group of measurements,—assuming they were correct,—Mr. Kollock said that he assumed that the witness would take the highest point in this north and south line measurement which he has taken at that point and connect them,—in other words, Mr. Kollock said, I don't see how you arrive at the point you marked "13."

The witness answered that he had explained, that on Sunday they went out and took most of the measurements; that is in the east and west direction;

(Testimony of Harry Olsen.)

and that of course you might have hit any elevation there but that they wanted to go over large enough area there and to be able to connect these various points together so as to form a continuous line which would show the exact location of the control line. Having platted these points they could see by following along the line that this was high,—71,—71,—etc., and if they continued straight across like that that they would would have hit some low points; [277—185] so they saw that the tendency was there,—that there was a long reef in there,—a higher part of the reef running up and down stream so they took the measurements the next day exactly on the line shown to trace out what the elevations would be by going in that direction; similarly they found there was a tendency rather than to continue way down here, it would drop down,—it would be a lower elevation; that we should turn; the controlling reef itself was turning upstream; and that they put the tape measure along there and accurately measured to check that; it shows here as correct elevations along the reef; and continued in the same way and traced out these points onto the reef itself which are the controlling elevations of the reef and they are continuous absolutely.

He stated that according to his calculations there would be one hundred second-feet flowing over the reef at an elevation of 1069 according to White' bench data, which would be 1070.056 according to Olsen's data using the velocity figures as furnished by Allen of 2.2 per second. He said that he was

not testifying anything about the velocity of the water at that point, but assuming Mr. Allen's velocity that at 1069.2 there would be approximately from 116 to 122 second-feet of water flowing at that point (reef).

Mr. Olsen was asked what the width of the water would be flowing over the reef at the point 1069,—the defendants' 1069, Olsen's 1070,—he was asked to mark points on the reef between which water would be flowing over. He answered from point F to G then there would be a little island there H to J; that of course the section is distorted,—pulled out, in other words the shore line,— [278—186] this is at an angle and naturally these points are angles, so it does not give exactly a true picture as to the exact width This is elongated; for instance, up to F in the east and west direction covers around 80 feet but stretched out along this line it is about 112 feet; similarly there would be J and K and L and M,—so many little islands in there that he did not know exactly what was wanted. He was told that they did not want the islands, and answered N to O. He said this would give about 67 feet of exposed water surface. He said that he did not have anything there to show the shore line of the river at low water; that the line would be carried further to the east than it would be at low water. That right now (when this work was done) that the amount of water that was in the river you have a showing of more water surface than would be at low water.

(Testimony of Harry Olsen.)

Counsel's next question was: "I see you are not able to draw the conclusion that I was interested in, from that. That is all."

Redirect Examination. (Tr. 359.)

(Questions by Mr. REAMES.)

He stated that under the conditions above described there would be portions of lands in between where these discharges were; there would be high places or rocks as shown; that as to the discharge through these various openings it would be considerably larger at some places than others; that in some places there would be just a little trickle; that there would be dry land across there as shown; that it must be remembered that these cross-sections [279—187] are just along this one point,—along the line of control; as you go down things change the course and direction naturally of this section and it may have a tendency to lead it over to the west for a while and then back to the east or it might all come together as is conceivable in one place below there.

The court said: The less water the more dry land you would have? And the witness answered yes.

Recross-examination.

(Questions by Mr. KOLLOCK. (Tr. 360.)

He stated that his determination of control point is based upon the flow of the water in the direction of the current or rather that the general direction of the flow is in that direction. In some places it is a little southeast or southwest; that at various

(Testimony of Harry Olsen.)

points in passing over the reef sometimes the water flows in a southwesterly direction and sometimes southeasterly; sometimes straight south; that sometimes it may do that and sometimes it may come together, depending upon minor points of control in the reef below.

Mr. Reames stated that before closing his case he would like to have the matter which the court had previously raised as to the engineering matters, disposed of.

Mr. Kollock stated that Mr. Allen was present and asked whether the court would ask Mr. Allen particular questions, and his Honor stated that he would rather the attorneys would take the burden of examining on the [280—188] engineering questions; that he didn't know much about it except to suggest in general,—the matter was not clear to him.

Mr. Kollock stated that he would be perfectly glad to do what the court wished. Accordingly Mr. Allen was called to the stand without objection and examined by the court.

TESTIMONY OF FLOYD W. ALLEN, FOR DEFENDANTS.

FLOYD W. ALLEN. (Tr. 362)

(Questions by the COURT.)

The court said that it was understood from Allen's testimony given on the previous day that when there was low water in the river that the defendants would keep the height of the forebay

(Testimony of Floyd W. Allen.)

1069,—approximately just the same; the witness answered that he distinguished between the forebay and the point of diversion,—the forebay being immediately above the plant. The court stated that is what it understood and asked did he so testify. The witness answered,—not the water in the forebay; that the water at the point of diversion is 1069; the water in the forebay which is at the end of the flume and entrance to the power-house will be at a materially less elevation,—that he testified to the exact elevation shown on a chart; that when the water at the point of diversion,—that is, above the uppermost wing-dam is at 1069 even, the water in the forebay will vary from 1069.0 to the point where the diversion is the maximum of 1350 second-feet, and the water in the [281—189] forebay will be 67.5, being a foot and a half below the level of the water at the point of diversion; that there is a foot and a half loss in the canal gates flume between the point of diversion and the power plant when the canal and the appurtenances are running at maximum capacity 1347 second-feet.

Mr. REAMES.—The question was,—at low water.

A. At low water.

The COURT.—Yes, take the case of low water running the highest capacity which you will run at low water,—the point which I am interested in, is there a place where you are going to take all of the water of the river? Do you contend that you ever take all of the water?

He answered that we do not contend that we will

take all of the water of the river at any time. He was asked by the court, What prevents you? The court said the thing that it was after was what Mr. Reames was trying to develop yesterday and the court didn't get a satisfactory explanation of it and the court asked, Why won't you take all of the water?

He answered: Starting with the power plant itself, is the gates of the turbine which would be automatically governed by certain head conditions; they have Tainter gate immediately above the power-house and forebay which is automatically controlled and which is at the end of the flume. It is under automatic control; then the restrictions of the capacity of the flume which is given width and given depth and designed to carry the maximum capacity when running,—when the river has a capacity of 1470 second-feet and the canal is reduced by like reasoning; and then there is restriction in the headgates [282—190] from the point of diversion into the entrance of the canal.

The court asked the height at the point where the forebay and flume connect; whether there was a flume there.

The witness answered that there was; asked its height he said its general,—the floor level of that flume would be 1062.0,—I believe I testified to. It is on that first one of these exhibits. The court said: Just approximately. And the witness answered it was 1062 he believed —1062.5 he believed he testified to at the bottom of the flume.

(Testimony of Floyd W. Allen.)

The court said the thing it could not understand is that with the bottom of the flume at 1062 and the water running through there why it doesn't draw away from this upper,—why it would not draw away from this quantity above all the time to allow running at capacity; that the court understood there were certain restrictions, but that if the blasted area were taken out wouldn't it take all the water down there through the canal for all practical purposes?

The witness answered,—no, it would not, and the court said it did not see why and the witness answered that he thought it was a very difficult thing to explain; that beginning with their gates he would assume a total area say of approximately 50 feet across, that intermittent piers cross those gates; that maximum capacity of this flume,—rather gates,—is based upon the river elevation; with all gates closed and the entire water of the stream compelled to go down the east channel, the river elevation which is 1470 second-feet would be approximately 71.7 feet; that is the river stage when running full; [283—191] that a part of that is divided and diverted into the westerly channel which would drop that elevation to 1069.0; that if by reason of the fact that the river channel itself were broadened out considerably and there is more area in the river and the canal combined to permit a lowering of the water to that extent, there is approximately a one-tenth drop between the headgates and above these gates. There is a total re-

sistance to these orifices, which are the gates, when running at 1350 second-feet, of 98/100 of a foot; if the gates are lowered and placed in the condition as they are with five additional gates in there, would be a loss of 55/100, almost 6/10 of a foot. If by any reason this water is lower, the section area is reduced by that much and decreasing the loss of head through the gates themselves, which would in turn decrease the volume of water materially through these orifices; in other words, the capacity of these gates is entirely based upon the loss of head that may be effective through these openings. Any material reduction in that destroys that loss of head which we have already allowed of 6/10 of a foot. That if you undertake to place any more than that through that diversion it would cause that loss of head to be greater and drop the water in the canal,—the flume, and all to an elevation that would permit only a given quantity of water to pass down the flume itself,—canal and flume,—going into the canal; that we will assume that the normal section is one and a half to one slope on the bank with flat bottom and approximately 60 feet upon the surface of the water. The capacity of the canal is based upon high-water level; but the level of the river when but 470 second-feet is passing down the river, it is materially higher than 69; [284—192] as the water decreases in the river in like manner, so does,—assuming this is 68.4,—as the water decreases in the river in like manner so does the water in the canal de-

(Testimony of Floyd W. Allen.)

crease, decreasing the most effective area of the cross-section by a probable, on top, 6/10 of a foot; assuming that to be 60 feet, and one and a half to one foot slope on the bank, and the base would be,—and our normal depth of 6 feet,—I think most of this is one to one slope on account of the rock,—you have a normal 324 square feet of area in the canal. If you reduce that by one foot from the top, you reduce that by 60 feet, or reduce that to 264 feet; as you drop the area of the canal, or even in the flume, your velocity decreases accordingly; it is not according to the area but that decrease reduces the quantity of water that may pass down either the canal or the flume in greater proportion than the loss of area that you have reduced, or the reduction of the height of the water. In other words 264 square feet in an elongated trapezoid of that character has less carrying capacity per square foot than the same sectional area 324 square feet has at that same dimension. That it is true in like manner where you have box flume with perpendicular sides and level section. In other words if the normal stage of the water is at 67.5, when it is reduced to 66.5 your reduction is one foot in that. Say the width is 18 feet, as in this case; your 18 foot loss of area there is greater in proportion than it represents as 18,—in other words the loss of cubic feet per second is greater in proportion than the loss of percentage in the area. The whole thing works itself back into,—

The COURT.—You are figuring on what flow of the river? [285—193]

(Testimony of Floyd W. Allen.)

A. I took the maximum diversion there which is the basis of drawing our calculation of 1320 cubic-feet.

Mr. Reames suggested that the court had asked for the conditions at low water and the witness answered, "Well, I have to make a specific case at low water under these conditions."

Mr. Reames suggested take 750 second-feet of water. The witness answered. You take 750 second-feet of water; that would divert about 630 second-feet; that would be just a trifle less than the capacity of one turbine under normal conditions, would be less loss of head in the canal and flume by reason of the lower amount of diversion but would also have that same like reduction in the cross-sectional area of the flume and canal.

Mr. Reames asked whether 630 second-feet would go through the flume and the canal and the answer was that it would. Whether it would do so at 1069 and the witness answered, "Yes. At low stage of water, only 770 second-feet of water in the flume; would not be up to 1069; water in the flume would be below that." Asked if it would go through, he said yes.

Cross-examination by Mr. REAMES. (Tr. 367.)

The witness was asked whether the 630 second-feet of water would pass through at 1068 and the witness answered that he would have to make a specific example of 1068. Asked if the water would go through the canal the witness answered: "Off-hand,—if everything was open, I am quite sure it

(Testimony of Floyd W. Allen.)

would, yes, if all the control [286—194] points were wide open,—I am quite sure." (Tr. 367.)

Asked if it would go through at 67 he answered: I doubt very much because it would lose the two feet of a most effective area out of this. Asked again if it would go through at 1067 he said he doubted it. He was asked if it would go through at 66 and answered that I would say positively that it wouldn't,—I would say almost positive that it would not go through at a river stage of 66. Asked if he admitted that it would go through at 68 he said:

A. "I said with all the control points open."

Asked if that wouldn't draw the water from above when the waterhead at 69 at the blasted area went down to 68,—whether that wouldn't pull the water from above he said, "As I said before, there are many factors that enter into that; one is the gates of the turbine itself." Asked to answer the question, he said: "I don't think it is fair to answer that question with yes or no," and the Court said, answer it as he could. He answered, "You cannot construct a power plant without certain conditions entering into the flow of the water. There is no loss in the open end flume which you are operating under, I mean with open end outlet. There is restriction and resistance to flow in the flume and canal and to put a specific,—to state a specific condition at all stages I don't see how I can answer that."

It was suggested to the witness that the question had been propounded at a definite water stage of

net 630 second-feet and an elevation of 69 which we now reduce to 68. He was asked whether that water was going to stand straight up at that point or whether the water is [287—195] going to run down and bring water from above. He answered,—with the flume wide open, I would assume your condition, at the outlet end, with no obstruction in there, it is perfectly natural that the canal will take its entire capacity, or such capacity as will be permitted at the elevation of water at entrance plus the head to be created by a certain volume of water within that canal. What it would be and what such head would be under those conditions, he would have to make specific conditions on it and figure it out as to what it would be.

He was reminded by the questioner that we already arrived at a given place. We had a stated elevation at the shattered area of 69, which we now reduce to 68; that we were trying to find out what the break would be there,—whether on any ordinary operation of the electric plant the water will be drawn down from above. He answered,—"Well, I have always stated the condition on which they would operate. In other words not only the operation of the turbine but in my previous testimony the character of the load is governing factor, and the regulation by consumption of that electrical energy just as much a factor as the turbines themselves."

He was asked to assume that the cement mill would grab all the power that it could get; that it was needing power, and to assume a reduction of the

(Testimony of Floyd W. Allen.)

water surface from 69 to 68 and to assume a flow of 630 second-feet of water in the canal,—could he answer the question whether that was going to draw the water down from above and answered that the turbines figured on,—if one turbine is running,—having capacity of 680 second-feet under [288—196] 22.8 head; as the head decreases the capacity of that turbine decreases; in other words the gates at the turbine are equivalent to any orifice; the quantity of water that will pass through the gates is subject to the head above; as he head increases the turbine will naturally take more volume of water and as it decreases it will take less water, by reason of its head on each side.

Asked what becomes of the volume of water he answered that it is discharged through the turbine; asked where the water was coming from he said from the forebay and from the river. Asked about the fluctuation of the water elevation from 69 to 68 he said that he hadn't said anything about fluctuating the water to 68.

He was reminded that he had said it would go through the plant and answered: "I said wide open; wide open conditions; everthing wide open; I didn't say under operating conditions."

He was reminded that the questioner supposed that he was talking about the operation of the cement plant and he answered: "Oh no," that he just meant to knock out the end and let the water run through.

He was reminded that the questioner was not contemplating that situation; that he was asking

(Testimony of Floyd W. Allen.)

that when there was a need of power at the cement plant and there was a flow of 630 second-feet running in their flume and they had a water surface elevation at 69 whether he could reduce that elevation to 68 and put the water through the electric plant having the demand for power at the cement plant. He answered that he imagined under certain conditions. He was asked to take the conditions of needing the power,—that they have two units and to put them both on. He [289—197] answered: "If there is only 770 second-feet of water, I might draw down the entire amount, yes, under those conditions, but I have always set up operating conditions in all my explanations."

He was asked if he could not do the same thing by drawing the elevation down to 67 and answered that he had never drawn to that low a figure,—that he did not know.

He was asked whether he could do it with 890 second-feet of water,—whether he could put it through the plant in ordinary operation of the cement mill. He answered, "Under certain operating conditions, if we failed to govern and govern properly, under the conditions you set forth, might put through 800 second-feet, yes."

Q. Might put through 900 too, couldn't you?

A. Would get probably a limit of 1200 limit. 1050 to 1200 second-feet.

Q. Put it all through at a water elevation of 68?

A. I don't know what the draft, the drawdown would be at the head waters under those conditions.

Q. I am talking about operating below 69 under the conditions described.

(Testimony of Floyd W. Allen.)

A. I can't readily concede the draft of the river down an elevation as low as 68 even under those conditions as you set forth.

Q. Well, you would draw all the water in the river under those conditions that you cut down to 68, wouldn't you?

A. Virtually speaking, yes; wouldn't be much left if we drew down to 68. I testified to that before. We have no desire to draw down to 68. [290—198]

Q. But as a matter of fact in the operation of your cement plant, when you needed all the power you could get, you could take all that water, couldn't you?

A. If you would want to set up a condition, ideal that is for taking all that water; probably you could under certain conditions take all the water in that river; but from the plan of operation and our intention of manufacturing both the electrical energy and how we intend to control the plant, plus the control of manufacturing cement, and the load we intend to put on it at that time, I do not think we will draw down the river below 1069.

But the fact remains that by the operation of your cement mill to get the power, all the power that you can, you can do it, can't you.

A. I have repeatedly said that we could.

Witness excused.

Plaintiff rests.

Defense rests.

(Tr. 372.) [291—199]

[Title of Court and Cause.]

Comes now the plaintiff, by A. E. Reames, its attorney, and tenders and presents the foregoing condensed statement of the evidence, and prays that it be, by the Court, approved.

It contains all of the testimony, condensed into narrative form, except the exhibits. It has been submitted to the defendants, and a copy thereof delivered to defendants' counsel.

Respectfully submitted,

A. E. REAMES,

Attorney for Plaintiff. [292—200]

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within and foregoing condensed statement of the evidence submitted for the court's approval is hereby acknowledged at Portland, Oregon, this 21 day of April, 1932.

JOHN K. KOLLOCK,

Of Counsel for Defendants.

Filed May 17, 1932. [293]

AND AFTERWARDS, to wit, on the 17th day of May, 1932, there was duly filed in said court an application for approval of statement of the evidence, in words and figures as follows, to wit: [294]

[Title of Court and Cause.]

APPLICATION FOR APPROVAL OF STATEMENT OF EVIDENCE.

Comes now the plaintiff and respectfully shows: That heretofore it lodged with the Clerk a condensed statement of the evidence, at that time serving upon counsel for the defendant a copy thereof. That since that time the counsel for the respective parties have together gone over said condensed statement of the evidence and modified the same where corrections were needed, and have now compiled said condensed statement as so agreed upon, and the same is herewith presented to the court for approval.

Respectfully submitted,
A. E. REAMES,
Attorney for the Plaintiff. [295]

The undersigned, of counsel for the defendants, DOES HEREBY CONSENT to the approval of said condensed statement of evidence as so presented at this time, and does join with the plaintiff in asking the Court to approve the same.

JOHN K. KOLLOCK,
Attorney for the Defendants.

Filed May 17, 1932. [296]

AND AFTERWARDS, to wit, on Tuesday, the 17th day of May, 1932, the same being the 60th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, United States District Judge, presiding.—the following proceedings were had in said cause, to wit: [297]

[Title of Court and Cause.]

ORDER APPROVING CONDENSED STATEMENT OF EVIDENCE.

Upon the stipulation of the respective parties hereto that the condensed statement of the evidence now tendered for approval is a full, true and correct statement of all of the evidence taken at the trial of this cause except the exhibits, portions of which are, according to said stipulation, to be printed as part of the statement of the evidence and the rest of which counsel have stipulated shall by direction of the Court be forwarded with the record,—

IT IS HEREBY ORDERED that said condensed statement of the evidence be and the same hereby is approved and the court finds and orders that it is a correct statement of all of the evidence so introduced at the trial of the cause excepting the said exhibits aforesaid; and [298]

IT IS FURTHER ORDERED that said condensed statement of the evidence be filed with the Clerk of this court.

Dated this 17th day of May, 1932.

JAMES ALGER FEE,
Judge of the District Court.

Filed May 17, 1932. [299]

AND AFTERWARDS, to wit, on the 17th day of May, 1932, there was duly filed in said court a stipulation relative to sending original exhibits to Court of Appeals and printing record on appeal, in words and figures as follows, to wit: [300]

[Title of Court and Cause.]

STIPULATION FOR PRINTING CERTAIN EXHIBITS AND FOR FORWARDING OTHERS. (Not Exclusive.)

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that an order may be made herein directing the Clerk to print the exhibits, or portions of exhibits, as hereinafter listed, with the statements hereinafter recited, and for the forwarding of all of the exhibits not fully printed in accordance with said order or any subsequent order herein.

This stipulation is not to the exclusion of other stipulations for the printing of other exhibits, parts of exhibits or statements as may be agreed

upon, nor to the printing of such other exhibits, portions of exhibits or statements as may be embodied in a like order of the court.

The exhibits, portions of exhibits, and statements referred to are as follows: [301]

1. Memorandum decision of Judge Robert S. Bean in case in this court No. 3098 and which is embodied in Defendants' Exhibit "EE," which is judgment-roll of this court No. 3408.

2. Decree of Judge Bean in said cause No. 3098 and dated May 3, 1911, Plaintiff's Exhibit No. 15.

3. Decree of December 20, 1929, in this court in cause E.–8891, Plaintiff's Exhibit 16 here.

4. The following statement shall be printed:

"Plaintiff's Exhibit 20½ is proof of claim filed by Oregon Water and Power Company, an Oregon corporation, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries, and is designated as Claim No. 30, Volume 1 (Proofs of Claims) and is the proof of claim referred to in Defendants' Exhibit 'O,' page 3, column 2. This Exhibit 'O' is a certified copy of the decree of the Circuit Court of the State of Oregon for Jackson County, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries. This proof of claim, Plaintiff's Exhibit 20½, is the one referred to in column 2, page 3 of the Decree of Adjudication wherein 220 second-feet were adjudicated to said Oregon Water and Power Co.

and which portion of said decree of adjudication was read into the evidence in this case.

"Exhibit 20½ is a document upon forms submitted by the State Engineer in adjudication proceedings and is entitled: [302]

"'BEFORE THE BOARD OF CONTROL OF THE STATE OF OREGON

"'Water Division No. 1

"'Jackson, Josephine and Curry Counties

"'In the Matter of the Determination of the Relative Rights to the Waters of the Rogue River and Its Tributaries. Water Diverted from Rogue River Through Power Canal Ditch.

"'Statement and Proof of Claimant.'

"The proof of claim states that it is in the name of Oregon Water and Power Company, an Oregon Corporation, for waters out of Rogue River for power development; that the date of the initiation of the right is October 30, 1899, made by posting notice and recording same, certified copy of which notice is attached. The notice attached is one signed by J. J. Houck, locator, for 300,000 miner's inches of the waters of Rogue River, and the copy is certified to by the County Recorder for Jackson County, Oregon. The claim states that the water is to be used for power development. The claim is for 1485 cubic-feet per second of the waters of said stream for the manufacture of 5,062 theoretical horse-power through a diverting dam in the Northeast quarter of the Northeast quarter of Section 15, Township 36 South of Range 3 West; water to be

conveyed by canal to the center of Section 15 for power-house equipped with turbines and generator and then returned to the river near the center of said Section 15. To the proof of claim is attached a blue-print showing a diversion dam across the river and a canal paralleling the river to the [303] power-house at or near the bank of the river."

5. There shall also be included in said printed record the following statement:

"Defendants' Exhibit 'O' is a printed copy of a decree entitled 'In the Circuit Court of the State of Oregon for Jackson County. In the Matter of the Determination of the Relative Rights of the Various Claimants to the Waters of Rogue River and Its Tributaries, above the Mouth of the Illinois River, in Jackson, Josephine and Curry Counties.' This printed decree is printed with three columns per page, covering 73 pages and eighty-four numbered paragraphs. It is dated April 26, 1919, and bears the certificate of the Clerk of said court that it is a true copy. It contains the following provisions:

"'4.

"'That the following named persons, firms, associations, and corporations, although duly and regularly notified as required by law of the commencement of these proceedings and although afforded opportunity to present their respective claims, and to be heard herein, have failed and neglected to appear in these proceedings, or to submit or offer any proof herein of any right, title, interest, or

claim thereto, in or to the use of, or the waters, or flow of the waters of said Rogue River or any tributary thereof involved in these proceedings; that the said persons, firms and corporations hereinafter named being in default herein, as more fully appears from the findings of fact of the State Water Board herein, are hereby declared to be in default, and are not [304] entitled to any right, title, or interest in or to the waters involved in these proceedings, nor any part thereof, nor to any riparian rights, rights by appropriation or prescription or otherwise in respect to the diversion or use of said waters or any thereof, or to appear herein and subsequently hereto assert any right, claim to, or interest in, said waters, or any of them, acquired, initiated or owned by them at or prior to the time of the commencement of these proceedings; and each of said persons, firms and corporations shall be, and hereby is, forever barred and estopped from hereafter asserting any rights heretofore acquired upon said Rogue River or any of its tributaries embraced within these proceedings, and shall be held, and hereby is declared, to have forfeited all rights to use of the waters herein involved, if any he had prior hereto, theretofore claimed by him; the persons, firms and corporations so being in default herein being as follows, to wi

(Following the words: 'to-wit:' is a long list of names of persons, companies and corporations, alphabetically arranged. The names of the following companies or corporations do not appear in the

said list of parties served and against whom default was entered as stated in said paragraph 4:

Prospect Construction Company.
Rogue River Electric Company.
Siskiyou Light and Power Company.
Condor Water and Power Company.
California-Oregon Power Company.
The California Oregon Power Company, plaintiff).

"In said Exhibit 'O' also appear the following provisions:

"'5.

"'That the persons, firms and corporations named in the tabulated statement of rights hereinafter set forth [305] as entitled to rights of appropriation of the waters herein involved, owing or being in possession of lands bordering on said Rogue River or any tributary stream herein embraced, have at all times used, and claimed the right to divert and use, said waters by virtue of appropriation thereof, and have waived any riparian rights they or their predecessors in interest may have had or claimed to the use of said waters which may have heretofore attached to or been appurtenant to their said lands.

"'6.

"'That in accordance with the findings of fact and order of determination of the State Water Board herein, both original and supplemental, as modified by this court, it is hereby determined, adjudicated, ordered, and decreed that the following claimants and appropriators named in the following

statement of their respective and relative rights have appropriated, and are entitled to the use of, the waters of the stream herein embraced under which their names appear, as of the priority date and to the extent set forth in said statement and that each of said claimants is entitled to, and shall have issued to him, water right certificate or certificates, according to law, in accordance with said statement, defining, establishing and confirming his title and right to the use of the waters of the particular stream or streams herein embraced to which he is hereby decreed a right, as set forth in said statement. That the name and postoffice address [306] of each such appropriator of the waters of Rogue River and its tributaries herein embraced, together with the date of relative priority of each such appropriation, the maximum amount of such appropriation in cubic-feet per second of time, in continuous flow, throughout the irrigation season herein fixed, the number of acres to which each irrigation right hereby confirmed is appurtenant, the use or uses for which such appropriation was appropriated and is now applied and to which such use is limited, the name of the ditch or ditches through which such appropriation is diverted, and a description of the lands to which such water right is appurtenant, set forth under the particular stream from which such appropriation is diverted, are as follows, to wit:'

"Following the words 'to-wit:' is the heading: 'Rogue River.' Under this heading there were introduced in evidence the following portions of said decree:

"'NEILSON & McCLURE, (W. L. McClure, Agt.) Gold Hill, Ore. (Proof 27, Vol. 1); Priority 1879; 75 second-feet; for power (250 horse-power); Braden ditch; water to be returned to the stream at or immediately below the place of use. Description of place of use: Lot 3, Sec. 11, Tp. 36 S. R. 3 W. W. M., Jackson County, Oregon.'

"'OREGON WATER & POWER CO., Gold Hill, Ore. (Proof 30, Vol. 1); Priority 1899; 220 second-feet; [307] for power (750 horse-power); Power Canal; water to be returned to the stream below the place of use; Description of place of use; Diversion in NE¼NW¼; Sec. 15; place of use in Sec. 15; Tp. 36 S. R. 3 W. W. M., Jackson County, Oregon.'

"'CALIFORNIA-OREGON POWER COMPANY, a corporation (Successor to Rogue River Electric Company), Medford, Ore.; Priority Aug. 5, 1902; 1560 second-feet from Sept. 1 to June 1 of each year; 1060 second-feet during June, July and Aug. of each year; for power (2600 horse-power); 10 second-feet additional for operating fish ladders; Gold Ray Canal and Dam; right limited to use of water and return thereof to stream at present point of return, below the power plant; See further Paragraph 11 of this decree; Description of place of use: Gold Ray power plant in S½ Sec. 18; Tp. 36 S. R. 2 W. W. M., Jackson County, Oregon.'

"'CALIFORNIA-OREGON POWER COMPANY, a corporation (Successor to Prospect Construction Company), Medford, Oregon; (Proof 31,

Vol. 1); priority October 8, 1904; 150 second-feet for present use for power; right to increase to not to exceed 400 second-feet, upon compliance with provisions of paragraph 12 of this decree; Prospect Flume; water diverted returned to stream at Power House; Description of place of use: Prospect Power Plant in W½NW¼; Sec. 6; Twp. 33 S., R. 3 E. W. M., Jackson County, Oregon.'" [308]

6. Print Defendant's Exhibit "W," certified copy of patent from the United States to Francis Marian Fredenburg. (Omit recorder's certificate as to copy.)

7. The following statement shall be printed:

"Plaintiff's Exhibit 30 is a stipulation between the respective parties hereto entered into at the trial (Tr. 337), and contains the following:

"'IT IS HEREBY stipulated by and between the parties hereto, in accordance with the understanding had at the trial of the case, that this stipulation could be made to take the place of evidence establishing the facts herein agreed to; that the suit in the Circuit Court of the State of Oregon, for Jackson County, by the City of Gold Hill against the Plaintiff herein, for the condemnation of nine (9) acres of Lot 1, described in the complaint, was begun in that court on the 5th day of October, 1926. That final judgment was entered therein for the defendant on June 13th, 1928. That on September 13th, 1928, the plaintiff herein in suit No. E.-8991 filed its complaint in this court against the defendant in that case, City of Gold

Hill and the defendant Beaver-Portland Cement Company. That this case went to final decree in this court on the 20th day of December, 1929. That on the 26th day of July, 1930, the plaintiff instituted this suit.'"

Wherever in this stipulation it is provided that certain matters shall be printed, it means that such printed statement contains the substance of the exhibit or record from which the statement is taken.

8. The following statement shall be printed:

"Plaintiff's Exhibit 14 is a certified copy of the Oregon Public Service Commission's Rules and Regulations, with the rates fixed by such commission to govern [309] plaintiff's charges for electrical current to be furnished by it as a public utility operating in Jackson County, Oregon, and elsewhere."

9. There shall also be printed as a part of this record on appeal the exhibits listed below, thirty printed copies of each of said exhibits being hereby submitted for that purpose. Such prints of said exhibits may be inserted by the Clerk in the printed Condensed Statement of the Evidence at the pages in said Condensed Statement upon which is shown the introduction of said exhibits respectively (and for the assistance of the Clerk printing the record, it is here stated that such Condensed Statement of the Evidence contains an index of Plaintiff's Exhibits and an index of Defendants' Exhibits showing the respective pages in the Condensed Statement at which the introduction for

identification of the exhibit is shown. Reference is also there made to the page of the Transcript of the Testimony where the same appears. The Clerk printing said exhibits shall use his best judgment as to the places in said printed *printed* Condensed Statement where the prints of such exhibits shall be inserted. If absolutely necessary some or any thereof may be placed in an appendix.)

The said exhibits so to be printed, and of which copies or prints accompany this statement for such purpose, are as follows: [310]

PLAINTIFF'S EXHIBITS.

1. Plaintiff's Exhibit "Number 22 and Number 23."
2. Plaintiff's Exhibit Number 4.
3. Plaintiff's Exhibit Number 5.
4. Plaintiff's Exhibit Number 9.
5. Plaintiff's Exhibit Number 10.
6. Plaintiff's Exhibit Number 12.
7. Plaintiff's Exhibit Number 13.
8. Plaintiff's Exhibit Number 22.

DEFENDANTS' EXHIBITS.

1. Defendants' Exhibit "E."
2. Defendants' Exhibit "F."
3. Defendants' Exhibit "H."
4. Defendants' Exhibit "K."
5. Defendants' Exhibit "L."

10. The said order of the Court shall direct the forwarding of all of the exhibits herein which this stipulation does not require to be printed in full.

11, It is further stipulated that the Condensed Statement of the Evidence that has been filed herein has been agreed upon by the parties as a correct statement, and the said order should so determine. That it is a correct statement of all of the evidence in the case excepting the exhibits to be printed as aforesaid, and the other exhibits which are by this stipulation to be forwarded with the record on appeal. [311]

This stipulation shall serve as an application to the court to make an order in accordance with the terms thereof, which order may be made either upon the filing of this stipulation or embraced in a general or any other order for the printing of the record.

Dated at Portland, Oregon, this 17th day of May, 1932.

A. E. REAMES,
Attorney for Plaintiff.
JOHN K. KOLLOCK,
Of Attorneys for Defendants.

Filed May 17, 1932. [312]

AND AFTERWARDS, to wit, on Tuesday, the 17th day of May, 1932, the same being the 60th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [313]

[Title of Court and Cause.]

ORDER DIRECTING THE PRINTING OF CERTAIN EXHIBITS AND THE FORWARDING OF THOSE NOT WHOLLY PRINTED, AND DIRECTING THE PRINTING OF CERTAIN STATEMENTS STIPULATED BY THE PARTIES TO BE CORRECT EXCERPTS OR STATEMENTS OF AND FROM THE EXHIBITS HEREIN.

It having been stipulated by the parties hereto, through their respective attorneys, that certain exhibits herein should be printed as part of the record herein, and as a part of the statement of the evidence herein, and that there shall also be contained in said printed statement the certain statements set out in said stipulation as containing the excerpts from exhibits introduced in the case or correct statements of and concerning the record of the case,—

IT IS ORDERED that there shall be copied by the Clerk of this court and printed as a part of the record on appeal and as a part of the Statement of the Evidence herein, the following exhibits introduced herein, to wit:

1. Memorandum decision of Judge R. S. Bean in cause in this court No. 3098, and which opinion is embodied the *Plaintiff's* Exhibit "EE," being judgment-roll of this court No. 3408.

2. Plaintiff's Exhibit 15.

3. Plaintiff's Exhibit 16. [314]

4. There shall also be printed the following statement to which the respective parties have so stipu-

lated as to the contents of Plaintiff's Exhibit 20½:

"Plaintiff's Exhibit 20½ is proof of claim filed by Oregon Water and Power Company, an Oregon corporation, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries, and is designated as claim No. 30, Volume 1 (Proofs of Claims) and is the proof of claim referred to in Defendants' Exhibit 'O,' page 3, column 2. This Exhibit 'O' is a certified copy of the decree of the Circuit Court of the State of Oregon for Jackson County, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries. This proof of claim, Plaintiff's Exhibit 20½, is the one referred to in column 2, page 3 of the Decree of Adjudication wherein 220 second-feet were adjudicated to said Oregon Water and Power Co. and which portion of said decree of adjudication was read into the evidence in this case.

"Exhibit 20½ is a document upon forms submitted by the State Engineer in adjudication proceedings and is entitled:

"'BEFORE THE BOARD OF CONTROL OF THE STATE OF OREGON

"'Water Division No. 1

"'Jackson, Josephine and Curry Counties

"'In the Matter of the Determination of the Relative Rights to the Waters of the Rogue River and Its Tributaries. Water Diverted from Rogue River Through Power Canal Ditch.

"'Statement and Proof of Claimant.'

"The proof of claim states that it is in the [315]

name of Oregon Water and Power Company, an Oregon Corporation, for waters out of Rogue River for power development; that the date of the initiation of the right is October 30, 1899, made by posting notice and recording same, certified copy of which notice is attached. The notice attached is one signed by J. J. Houck, locator, for 300,000 miner's inches of the waters of Rogue River, and the copy is certified to by the County Recorder for Jackson County, Oregon. The claim states that the water is to be used for power development. The claim is for 1485 cubic-feet per second of the waters of said stream for the manufacture of 5062 theoretical horse-power, through a diverting dam in the Northeast quarter of the Northeast quarter of Section 15, Township 36 South of Range 3 West; water to be conveyed by canal to the center of Section 15 for power-house equipped with turbines and generator and then returned to the river near the center of said Section 15. To the proof of claim is attached a blue-print showing a diversion dam across the river and a canal paralleling the river to the power-house at or near the bank of the River."

5. There shall also be included in said printed record the following statement:

"Defendants' Exhibit 'O' is a printed copy of a decree entitled 'In the Circuit Court of the State of Oregon for Jackson County. In the Matter of the Determination of the Relative Rights of the Various Claimants to the Waters of Rogue River and Its Tributaries, above the Mouth of the Illinois River, in Jackson, Josephine and Curry Counties.' This printed decree is printed with three columns

per page, covering 73 pages and [316] eighty-four numbered paragraphs. It is dated April 26, 1919, and bears the certificate of the Clerk of said court that it is a true copy. It contains the following provisions:

"'IV.

"'That the following named persons, firms, associations, and corporations, although duly and regularly notified as required by law of the commencement of these proceedings and although afforded opportunity to present their respective claims, and to be heard herein, have failed and neglected to appear in these proceedings, or to submit or offer any proof herein of any right, title, interest, or claim thereto, in or to the use of, or the waters, or flow of the waters of said Rogue River or any tributary thereof involved in these proceedings; that the said persons, firms and corporations hereinafter named being in default herein, as more fully appears from the findings of fact of the State Water Board herein, are hereby declared to be in default, and are not entitled to any right, title, or interest in or to the waters involved in these proceedings, nor any part thereof, nor to any riparian rights, rights by appropriation or prescription or otherwise in respect to the diversion or use of said waters or any thereof, or to appear herein and subsequently hereto assert any right, claim to, or interest in, said waters, or any of them, acquired, initiated or owned by them at or prior to the time of the commencement of these proceedings; and each of said persons, firms and corporations shall be, and hereby is, forever barred and estopped from hereafter asserting any rights here-

tofore acquired upon said [317] Rogue River or any of its tributaries embraced within these proceedings, and shall be held, and hereby is declared, to have forfeited all rights to use of the waters herein involved, if any he had prior hereto, theretofore claimed by him; the persons, firms and corporations so being in default herein being as follows, to-wit:' (Following the words: 'to-wit:' is a long list of names of persons, companies and corporations, alphabetically arranged. The names of the following companies or corporations do not appear in the said list of parties served and against whom default was entered as stated in said paragraph IV:

Prospect Construction Company.
Rogue River Electric Company.
Siskiyou Light and Power Company.
Condor Water and Power Company.
California-Oregon Power Company.
The California Oregon Power Company, plaintiff).

"In said Exhibit 'O' also appear the following provisions:

"'V.

"'That the persons, firms and corporations named in the tabulated statement of rights hereinafter set forth as entitled to rights of appropriation of the waters herein involved, owning or being in possession of lands bordering on said Rogue River or any tributary stream herein embraced, have at all times used, and claimed the right to divert and use, said waters by virtue of appropriation thereof, and have waived any riparian rights they or their prede-

cessors in interest may have had or claimed to the use of said waters which may have heretofore attached to or been appurtenant to their said lands. [318]

"'VI.

"'That in accordance with the findings of fact and order of determination of the State Water Board herein, both original and supplemental, as modified by this court, it is hereby determined, adjudicated, ordered and decreed that the following claimants and appropriators named in the following statement of their respective and relative rights have appropriated, and are entitled to the use of, the waters of the stream herein embraced under which their names appear, as of the priority date and to the extent set forth in said statement and that each of said claimants is entitled to, and shall have issued to him, water right certificate or certificates, according to law, in accordance with said statement, defining, establishing and confirming his title and right to the use of the waters of the particular stream or streams herein embraced to which he is hereby decreed a right, as set forth in said statement. That the name and postoffice address of each such appropriator of the waters of Rogue River and its tributaries herein embraced, together with the date of relative priority of each such appropriation, the maximum amount of such appropriation in cubic feet per second of time, in continuous flow, throughout the irrigation season herein fixed, the number of acres to which each irrigation right hereby confirmed is appurtenant, the use or uses for which such appropria-

tion was appropriated and is now applied and to which such use is limited, the name of the ditch or ditches through which such appropriation is diverted, and a description of the lands to which such water [319] right is appurtenant, set forth under the particular stream from which such appropriation is diverted, are as follows, to wit:'

"Following the words 'to-wit:' is the heading: 'Rogue River.' Under this heading there were introduced in evidence the following portions of said decree:

"'NEILSON & McCLURE, (W. L. McClure, Agt.) Gold Hill, Ore. (Proof 27, vol. 1); Priority 1879; 75 second-feet; for power (250 horse-power); Braden ditch; water to be returned to the stream at or immediately below the place of use; Description of place of use: Lot 3, Sec. 11, Tp. 36 S. R. 3 W. W. M., Jackson County, Oregon.'

"'OREGON WATER & POWER CO., Gold Hill, Ore. (Proof 30, Vol. 1); Priority 1899; 220 second-feet; for power (750 horse-power); Power Canal; water to be returned to the stream below the place of use; Description of place of use: Diversion in NE¼ NW¼; Sec. 15; place of use in Sec. 15; Tp. 36 S. R. 3 W. W. M., Jackson County, Oregon.'

"'CALIFORNIA-OREGON POWER COMPANY, a corporation (Successor to Rogue River Electric Company), Medford, Ore.; Priority Aug. 5, 1902; 1560 second-feet from Sept. 1 to June 1 of each year; 1060 second-feet during June, July and Aug. of each year; for power (2600 horse-power); 10 second-feet additional for operating

fish ladders; Gold Ray Canal and Dam; right limited to use of water and return thereof to stream at present point of return, below the power plant; See further [320] Paragraph 11 of this decree; Description of place of use: Gold Ray power plant in S½ Sec. 18; Tp. 36 S. R. 2 W. W. M., Jackson County, Oregon.'

"'CALIFORNIA-OREGON POWER COMPANY, a corporation, (Successor to Prospect Construction Company), Medford, Oregon; (Proof 31, Vol. 1); priority October 8, 1904; 150 second-feet for present use for power; right to increase to not to exceed 400 second-feet, upon compliance with provisions of paragraph 12 of this decree; Prospect Flume; water diverted returned to stream at Power House; Description of place of use: Prospect Power Plant in W½ NW¼; Sec. 6; Twp. 33 S., R. 3 E. W. M., Jackson County, Oregon.'"

6. The Clerk shall also so copy Defendants' Exhibit "W" omitting certificate of recorder.

7. The following statement shall be printed:

"Plaintiff's Exhibit 30 is a stipulation between the respective parties hereto entered into at the trial (Tr. 337), and contains the following:

"'IT IS HEREBY stipulated by and between the parties hereto, in accordance with the understanding had at the trial of the case, that this stipulation could be made to take the place of evidence establishing the facts herein agreed to; that the suit in the Circuit Court of the State of Oregon, for Jackson County, by the City of Gold Hill against the

Plaintiff herein, for the condemnation of nine (9) acres of Lot 1, described in the complaint, was begun in that court on the 5th day of October, 1926. That final judgment was entered therein [321] for the defendant on June 13th, 1928. That on September 13th, 1928, the plaintiff herein in suit No. E.–8991 filed its complaint in this court against the defendant in that case, City of Gold Hill and the defendant Beaver-Portland Cement Company. That this case went to final decree in this court on the 20th day of December, 1929. That on the 26th day of July, 1930, the plaintiff instituted this suit.'"

8. The following statement shall be printed:

"Plaintiff's Exhibit 14 is a certified copy of the Oregon Public Service Commission's Rules and Regulations, with the rates fixed by such commission to govern plaintiff's charges for electrical current to be furnished by it as a public utility operating in Jackson County, Oregon, and elsewhere."

9. There shall also be printed the following Exhibits:

PLAINTIFF'S EXHIBITS.

a. Plaintiff's Exhibit Number 22 and Number 23.
b. Plaintiff's Exhibit Number 4.
c. Plaintiff's Exhibit Number 5.
d. Plaintiff's Exhibit Number 9.
e. Plaintiff's Exhibit Number 10.
f. Plaintiff's Exhibit Number 12.
g. Plaintiff's Exhibit Number 13.
h. Plaintiff's Exhibit Number 22.

DEFENDANTS' EXHIBITS.

a. Defendants' Exhibit "E."
b. Defendants' Exhibit "F."
c. Defendants' Exhibit "H."
d. Defendants' Exhibit "K."
e. Defendants' Exhibit "L." [322]

Thirty copies of each thereof have been deposited with the Clerk, being a print made from the originals, and they shall be printed in the condensed statement of the evidence at the place therein which shows the introduction of such exhibits, respectively. Or if the Clerk should find this inconvenient he should so use such copies in said printing in said statement of the evidence as will be most convenient for the court.

IT IS FURTHER ORDERED that the Clerk of this court shall forward to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit all of the other exhibits in this case which this order does not direct the Clerk to print in full.

And based upon said stipulation,—

IT IS ORDERED that said condensed statement is a full, true and correct statement of all of the evidence received at the trial of this cause, excepting the exhibits referred to in said statement, certain of which exhibits are, by the terms of this order, directed to be printed, and all of the rest of which are by this order directed to be forwarded with the record to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 17th day of May, 1932.

JAMES ALGER FEE,
District Judge.

Filed May 17, 1932. [323]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 4 to 323, inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which the California Oregon Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, is plaintiff and appellant, and Beaver Portland Cement Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and City of Gold Hill, Oregon, a Municipal Corporation, existing under the laws of the State of Oregon, are defendants and appellees; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody, except that

captions, verifications, and acceptances of service omitted from said transcript, were omitted by direction of the appellant.

I further certify that the cost of the foregoing transcript is $49.20, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 15th day of June, 1932.

[Seal] G. H. MARSH,
Clerk. [324]

[Endorsed]: No. 6874. United States Circuit Court of Appeals for the Ninth Circuit. The California Oregon Power Company, a Corporation, Appellant, vs. Beaver Portland Cement Company, a Corporation, and City of Gold Hill, Oregon, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed June 18, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6874

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE CALIFORNIA OREGON POWER COMPANY, a Corporation,

Appellant,

vs.

BEAVER PORTLAND CEMENT COMPANY, a Corporation, and CITY OF GOLD HILL, OREGON, a Municipal Corporation,

Appellees.

Upon Appeal from the District Court of the United States for the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a Stated Term, to wit: The October Term A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the sixteenth day of December in the year of our Lord one thousand nine hundred and thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable JULIAN W. MACK, Circuit Judge.

[Title of Court.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. A. E. Reames, counsel for the appellant, and by Mr. John K. Kollock, counsel for appellees, and submitted to the court for consideration and decision, with leave to counsel for the appellant to file a reply brief within ten (10) days from date.

As a Stated Term, to wit: The October Term A. D. 1934, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the fifth day of November in the year of our Lord one thousand nine hundred and thirty-four.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

[Title of Court.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF DECREE.

By direction of the court, ORDERED that the opinion and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the majority opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Appeal from the United States District Court for the District of Oregon.

Before: WILBUR, SAWTELLE and MACK, Circuit Judges.

MACK, Circuit Judge:

Plaintiff is the owner of land on the east side of the Rogue River, a meandering nonnavigable stream in Oregon, directly opposite land on the west side, the legal title to which is in defendant City of Gold Hill; defendant Cement Company has possession of the City's land under an executory contract of purchase. Ownership in each case extends to the thread of the stream. Pursuant to its plan to build a dam and power plant on the west side of the river, Cement Company exploded charges of dynamite in reefs in the river bed but entirely west of the thread of the stream, for the purpose of permitting a freer flow of water down the west side of the river and of securing an available supply of broken rock for the construction of the dam. Plaintiff, claiming that the prosecution of these operations would divert the water from its land on the east side of the river and interfere with its rights as a riparian owner on the stream, sought an injunction to prevent defendants carrying on further blasting operations, removing the blasted rock from the bed of the stream and doing anything else that would change the bed of the stream or lessen the flow of water over plaintiff's side of the river bed. The injunction as prayed for was denied but, to ensure that some water

would continue to flow down the plaintiff's side of the stream, defendants were enjoined from reducing the surface elevation of the water at the contemplated point of diversion below 1070.056 feet above sea level. From this decree, plaintiff alone appeals.

Plaintiff's principal contentions are that by the rule of the common law a riparian owner on a non-navigable stream has a vested right to the natural flow of the stream not substantially diminished or diverted from its natural course; that this rule of "continuous flow" was part of the law of Oregon when plaintiff's lands were acquired by its predecessors from the government in 1885; and that the vested property right thus created is protected as against changes in the Oregon law by the Federal Constitution. Defendants deny that the common law rule created vested claims of continuous flow; they base their own claims on adjudicated rights and permits under the Oregon Water Code of 1909.

1. This Code establishes a comprehensive system for the adjudication of water rights; there is therein provision both for the determination of existing rights and for the acquisition of new rights. Section 11 of the Code provides: "Upon a petition to the state engineer, signed by one or more water users upon any stream, requesting the determination of the relative rights of the various claimants to the waters of that stream, it shall be the duty of the state engineer, if, upon investigation, he finds the

facts and conditions are such as to justify, to make a determination of the said rights. . . . In case suit is brought in the circuit court for the determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the state engineer for determination as in this act provided." 3 Or. Code Ann. (1930) Sec. 47-601. In either case, the determination of the state engineer does not become final until confirmed by the circuit court of the county in which the determination is had. Id. Sec. 47-614. Section 45 of the Water Code provides: "Any person, association or corporation hereafter intending to acquire the right to the beneficial use of any waters shall, before commencing construction, enlargement or extension of any ditch, canal or other distributing works, or performing any work in connection with said construction, or proposed appropriation, make an application to the state engineer for a permit to make such appropriation." Id. Sec. 47-501. After the appropriation is completed, the party is entitled to a certificate of water rights, from the state engineer, like that granted after an adjudication. Id. Sec. 47-508.

In the operation of its power plant, Cement Company purposes utilizing a maximum of 1397 second feet of water. Of this amount, 295 second feet have been recognized in an adjudication under the Code; the other 1102 second feet are covered by water permits issued by the state engineer under section 45. Plaintiff, although it denies that it was a party to that adjudication and therefore bound by that de-

cree, does not contest defendant's right to use the 295 second feet. It contends, however, that that amount is now available to defendant without necessitating any change in the river bed. Defendants' permits for the other 1102 second feet, plaintiff contends, are "mere options", which cannot justify interference with the rights of other riparian owners.

The District Judge, as an alternative ground for the denial of the injunctive relief sought, relied upon plaintiff's failure to avail itself of the procedure provided by the Water Code for the determination of its rights. An invitation to further proceedings in the state courts was thought by him to be implicit in the earlier opinion of this court in a related controversy between the same parties, City of Gold Hill v. California Oregon Power Co., 35 F. (2d) 317 (1929), in which the questions now at issue were expressly reserved from decision. Cf. Pacific Livestock Co. v. Silview River Irr. Co., 200 Fed. 487 (C. C. A. 9, 1912).

The procedure established by the Water Code is in part at least administrative; it has been sustained in that aspect against constitutional attack both by the Oregon courts and the United States Supreme Court. In re Willow Creek, 74 Or. 592, 144 Pac. 505 (1914); Pacific Livestock Co. v. Lewis, 241 U. S. 440 (1916). Therefore the question arises whether or not plaintiff should have been relegated to the state tribunals on the principle that one who seeks injunctive relief in the federal courts must first exhaust the administrative remedies which the

state provides. Prentis v. Atlantic Coast Line Co., 211 U. S. 210 (1908); Porter v. Investors Syndicate, 286 U. S. 461 (1932). In both of these cases, the injunction was sought against the administrative body itself on constitutional grounds; in the instant case, the suit is between private parties and jurisdiction is based solely on diversity of citizenship. The principle of comity, which dissuades the federal court from enjoining the enforcement of state administrative determinations before they have been concluded, may be equally applicable, however, to justify a refusal to entertain a private suit which would in effect check or prevent the functioning of the administrative body. The decree of the court might in such a case conflict with adjudications by the administrative body of other water rights on the same stream and thus create just such a chaotic condition as the administrative determination of the water rights is designed to prevent.

In Oregon a suit involving water rights may be instituted in the state circuit court and in the discretion of the court, the issues may be referred to the state engineer for preliminary determination. But the circuit court, whether in reviewing the state engineer's determination or in making an original disposition of the suit, is not acting in an administrative capacity; its determination is res adjudicata as to all parties and issues properly before it. Abel v. Mack, 131 Or. 586, 283 Pac. 8 (1929); Cf. In re

Waters of Walla Walla River, 141 Or. 493, 502, 16 P. (2d) 939, 943 (1932). To compel plaintiff first to establish its rights in the circuit court of the state would therefore result in denying it entirely its right to begin proceedings in the federal courts. Cf. Railroad Commission v. Duluth Street Ry. Co., 273 U. S. 625 (1927); City Bank Co. v. Schnader, 291 U. S. 24 (1933). Whether the Circuit Court would be required to refer such a case as this to the state engineer for preliminary determination is at least doubtful. It has been reversed for failure to do so when the evidence was conflicting and the rights of those not party to the suit were likely to be affected. Oregon Lumber Co. v. East Fork Irrigation District, 80 Or. 568, 157 Pac. 963 (1916); Pacific Livestock Co. v. Balcombe, 101 Or. 233, 199 Pac. 587 (1921). But in the instant case, the rights of only the immediate parties are involved. Moreover, it is doubtful whether the administrative procedure provided by the state is adapted to the determination of such claims as those of plaintiff. The function of an adjudication under the Code is primarily to allocate definite quantities of water on the basis of prior or contemplated use. Plaintiff, however, claims the right to an indefinite quantity of water, namely the natural flow of the stream, on the basis of its riparian ownership. As the Oregon court has said:

> "By reason of the fact that the old riparian right doctrine does not provide for a fixed quantity of water to be apportioned to different persons on tracts of land, the rule * * * cannot be worked out or applied under the Water

Code of 1909 in the adjudication of the relative rights of the various claimants to the use of water of a stream system."

Re Water Rights of Hood River, 114 Ore. 112, 162, 227 Pac. 1065, 1081 (1924).*

Thus plaintiff stands on rights alleged to have become vested independently of the Water Code and the procedure thereby established. In the light of all of these considerations, we conclude that the principle that one must exhaust the administrative remedies provided by the state before seeking injunctive relief in the federal court, is inapplicable to the instant case.

2. Plaintiff contends that its right as riparian owner to have the stream continue to flow substantially undiminished in its natural channel is established by Weiss v. Oregon Iron & Steel Co., 13 Or. 496, 11 Pac. 255 (1886) and other cases. In the Weiss case, an upper riparian owner was enjoined from diverting water permanently for manufacturing purposes and thus diminishing substantially the flow of water to the lands of the plaintiff, a lower riparian owner. The court said:

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*Cf. In re Water Rights of Deschutes River & Tributaries, 134 Or. 623, 685, 703, 286 Pac. 563, 585, 294 Pac. 1049, 1051 (1930); appeal dismissed (as taken too late). Columbia-Deschutes Power Co. v. Stricklin, State Engineer, 290 U. S. 590 (1933). The valuable briefs filed therein in the Supreme Court of the United States have been examined. The appellant urged among other contentions, the constitutional objections presented by plaintiff herein.

> "The defendant, as riparian owner, has a right to the use of the stream for its own necessary uses; but this right must be reasonably exercised, and there must be no substantial diminution or waste. * * * What is a reasonable use must necessarily depend upon the facts, considering the size of the stream and the amount appropriated. But all the authorities concur that when the amount abstracted perceptibly or materially diminishes the quantity of the stream, such use of it by a riparian owner is unreasonable, and an infringement on the rights of other riparian owners, for which the law furnishes redress. The plaintiff is entitled to have the natural flow of the water, in its accustomed channel, subject only to the diminution and retardation incident to a reasonable use." 13 Or. at 500, 11 Pac. at 257.

This rule of natural or continuous flow was also applied in Cox v. Bernard, 30 Or. 53, 64 Pac. 860 (1901), and Mace v. Mace, 40 Or. 586, 67 Pac. 660, 68 Pac. 787 (1902). At the same time, however, rights acquired by appropriation while a stream was flowing through public lands were recognized as superior to riparian rights subsequently arising. Carson v. Gentner, 33 Or. 512, 52 Pac. 506 (1898); Brown v. Baker, 39 Or. 66, 65 Pac. 799 (1901). It was also said to be "established doctrine in this state that a settler upon public lands may claim the use of water either as a riparian owner or as an appropriator, but he cannot do both. The

exercise of one right is in substance the waiver of the other." Caviness v. La Grande Irr. Co., 60 Or. 410, 421, 119 Pac., 731, 735 (1911).

In Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083 (1909), the court thoroughly considered the effect on Oregon water law of the Federal Desert Land Act of Mar. 3, 1877, 19 Stat. 377, 43 U. S. C. 321. That act contained provision that ". . . all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights". This provision was interpreted as a permanent reservation and dedication to the public with the result that "all lands settled upon after the date of the latter act were accepted with the implied understanding that (except as hereinafter stated) the first to appropriate and use the water for the purposes specified in the act should have the superior right thereto". 51 Or. at 399, 98 Pac. at 1095. The exception later stated was that appropriators would not be permitted so far to deplete the flow as to deprive a riparian owner of water essential for his domestic needs. 51 Or. at 404, 98 Pac. at 1097. So long as this right of domestic use was not infringed, the riparian owner whose lands had been settled after the Act, could not object to an appropriation of water which diminished the flow of the stream.

The Oregon Water Code, adopted in 1909 after the decision in Hough v. Porter, does not specify what consideration, if any, is to be accorded in the determination of water rights to a riparian owner merely because of such ownership. Section 1 provides: "Subject to existing rights, all waters within the state may be appropriated for beneficial use as herein provided and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation or association to any water." 3 Or. Code Ann. (1930) Sec. 47-404. Section 70 of the Water Code, in explanation of vested rights, provides: "(2) Actual application of water to beneficial use prior to the passage of this act by or under the authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use." Id. Sec. 47-403.

These and related provisions of the Code were definitely construed in Re Water Rights of Hood River, 114 Or. 112, 227 Pac. 1065 (1924), to abolish the rule of continuous flow contended for by plaintiff in the instant case. That was an adjudication under the Code, in which the Pacific Power and Light Co. stood on its alleged right as a riparian owner to have the stream flow "undiminished by the acts or appropriations of others above its said lands other than by the reasonable use thereof by upper riparian owners for watering livestock and for domestic purposes, and by the reasonable use by such

riparian owners of the waters of such stream for the irrigation of lands actually riparian to said stream". By a four to three decision this claim was denied. Mr. Justice Bean, writing for the majority of the court, said: "The granting of the contention of the Pacific Power and Light Company and going back to the old rule of 'continuous flow' of a stream, would take the heart out of the Water Code. . . ." 114 Or. at 162, 227 Pac. at 1081. He also expressed the opinion that the common law rule under which "the riparian owner was entitled to the full flow of the stream through his land, except as the flow might be affected by a reasonable use thereof by other riparian owners", had never been adopted to the full extent in Oregon. As to this, however, a majority of the Court disagreed with him. Nevertheless, a majority held that the Water Code in any event had abolished the rule of continuous flow as to lands acquired before as well as those acquired after its adoption, and that the provision therein saving vested rights was limited to rights acquired through "actual application of water to beneficial use", as defined in Section 70. A minority, on the other hand, were of the opinion that the Code could, and to avoid constitutional difficulties, should be interpreted so as to preserve as vested rights, the riparian rights of proprietors of lands which had passed into private hands while the rule of continuous flow prevailed in Oregon.

3. The Hood River case as well as Norwood v. Eastern Oregon Land Co., 112 Or. 106, 227 Pac.

1111, decided on the same day, involved lands which passed from the government prior to the Desert Land Act of 1877. In the instant case, plaintiff's rights date back only to 1885, the date of the government patent on which its title is based. We come, therefore, to the question of the interpretation of that act and primarily to the consideration of Hough v. Porter, supra.

The Desert Land Act was passed for the purpose of facilitating the settlement of the public domain arid land by permitting title to be acquired thereto by one who declared his intention of reclaiming it and who completed the reclamation within the prescribed period. The right to the use of water by one so conducting it upon desert land is limited to the "amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation"; then follows the provision relied on in Hough v. Porter that "all surplus water . . . together with the waters of all lakes, rivers, and other sources of water supply on the public lands shall remain and be held free for the appropriation and use of the public . . .". Of this provision, the court in Hough v. Porter said:

> "This reservation of water rights for the benefit of the public was clearly not essential to any of the other provisions of the act. The previous statement contained sufficient to define and protect the rights of those selecting lands under the desert land act; but the added proviso, or something of similar import, was

> essential to the establishment of a clear and uniform rule upon the subject as regards all appropriations thereafter to be made from streams or other bodies of water upon the public lands and to which such might be riparian. The words 'shall remain and be held free for the appropriation and use of the public for irrigation,' etc., are clearly words of reservation and dedication, and obviously so intended." 51 Or. at 386, 98 Pac. at 1091.

This reservation and dedication, it was concluded, had the effect of permanently severing from the lands then owned by the government and subsequently granted by it, the right which the riparian owner might otherwise have, to object to an appropriation of water not already put to a beneficial use.

Both the reasoning and the result of Hough v. Porter have been unqualifiedly adopted by the Supreme Court of South Dakota in Cook v. Evans, 45 S. D. 31, 185 N. W. 262 (1922), and Haaser v. Englebrecht, 45 S. D. 143, 186 N. W. 572 (1922); and the grounds of the decision were termed "plausible" in Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 344 (1909), a case from the Supreme Court of Arizona, in which the question was raised but not decided.

In Washington and in California, however, a narrower interpretation of the Desert Land Act has been adopted. In Still v. Palouse Irr. & Power Co., 64 Wash. 606, 117 Pac. 466 (1911), lower riparian

owners successfully objected to an upper riparian owner so impounding the water as materially to alter the natural flow of the stream by and through the plaintiffs' land. The contention that the plaintiffs had no riparian right to the natural flow, as against an actual appropriation by defendant because their lands were acquired from the government after the Act of 1877, was denied on the grounds that the plaintiffs' lands were not acquired under, even though after, that Act and that no valid and existing appropriation of water had been made by defendant or its predecessors prior to the vesting of plaintiffs' riparian rights. See, too, Bernot v. Morrison, 81 Wash. 538, 559, 143 Pac. 104, 111 (1914). In San Joaquin & Kings River Canal & Irr. Co. v. Worswick, 187 Cal. 674, 203 Pac. 999 (1922), the plaintiffs contended that their rights of appropriation were superior to the defendants' right as upper riparian owners to use the waters of the stream, because the defendants' lands were acquired from the government after 1877. In disposing of this contention the California Court said:

> "It is obvious from the framework and language of the act of 1877 that it was not intended to apply to all the public lands of the United States. Its main purpose was to provide for the sale of desert lands which could be reclaimed by bringing water thereon. It may be true that as to such lands the purpose was to divert the riparian rights in the waters existing thereon and devote the same to the public uses stated. We do not think that question is in-

volved in the present case, and we need not express any opinion on it. There is nothing in the act which justified giving that particular part thereof so wide an application as to embrace all lands of the United States, wherever situated. The plaintiffs do not claim that any of the land belonging to the defendants was purchased or acquired under the Desert Land Act, and there is no finding that in fact such lands were desert lands. * * * It follows from what we have said that the rights of the plaintiffs under their appropriations are not affected by the provisions of the Desert Land Act." 187 Cal. at 690, 203 Pac. at 1007.

In these decisions, Washington and California do not limit the right of appropriation to desert lands, recognizing that appropriations of water running through any public lands, whether desert lands or not, may be entitled to priority over subsequently acquired riparian rights. The California and Washington rule does, however, limit the application of the reservation provision of the Act to lands acquired thereunder, insofar as, if at all, the effect of the Act is permanently to subordinate to the right of appropriation the riparian rights in lands then owned and subsequently granted by the government.

The legislative history of the Desert Land Act as found in Cong. Rec. 44th Cong. 2nd session, V. 5, pt. 3, pp. 1961, 1964-1974, 2225, comports better with the narrow interpretation accorded it by Washington and California than with the broad interpre-

tation of Hough v. Porter. By the Act of 1866, Congress had already provided that rights to the use of water upon public lands, acquired by appropriation and recognized by "the local customs, laws and the decisions of courts", should be maintained and protected. R. S., Sec. 2339, 43 U. S. C., sec. 661. By the act of 1870, it was further provided that all patients granted or preemption or homesteads allowed should be subject to any vested and accrued water rights acquired under or recognized by the Act of 1886. R. S., sec. 2340, 43 U. S. C., sec. 661. Of this legislation, a distinguished writer says:

> "The Act of 1866 gave the formal sanction of the United States to the prevailing theory of a grant to the holders of existing rights upon public land, which indeed was its primary object; for the statute had in view chiefly appropriations already made rather than future ones, and the protection of existing rights on public land against the United States itself (by the Act of 1866) and against its later riparian patentees (by the enactment of 1870) was the primary object. * * *
>
> "It further provided the same method for acquiring water rights on public land in the future; a vindication of the existing system for the future as well as for the past; . . . * * *
>
> "But as we proceed we must remember that it was wholly public land law, involving solely

> rights in the unoccupied public domain. * * *"
> 1 Wiel, Water Rights in the Western States (3d Ed. 1911) 116.

The Desert Land Act as originally reported to the Senate by the Committee on Public Lands, did not contain the provision limiting the right to the use of water by one acquiring under the Act, to the amount needed for reclamation and reserving all surplus water and other waters on the public domain to the use of the public. Indeed the Committee expressed the belief that no further legislation was necessary to regulate the use of water for purposes of irrigation. The provision now in question originated as an amendment offered on the floor of the Senate for the avowed purpose of preventing one who should acquire his lands under the Act, from securing a monopoly over more water than was reasonably required for his own tract; it was modified in the course of debate to avoid the suggested possibility of conflicting with the Act of 1866. Nevertheless, the Act of 1877, literally interpreted, goes further than the previous legislation, in that it reserves to the public the right of appropriating water on all public lands regardless of whether or not such a right is recognized by "local customs, laws, and decisions of courts". But neither the language nor the history of the Act, fairly interpreted, supports the holding in Hough v. Porter that appropriations made after the government had parted with its title to the land outrank the riparian rights which state law would

otherwise attach to government grants other than those under the Desert Land Act itself.

Furthermore, the interpretation of the Desert Land Act in Hough v. Porter is inconsistent with the general doctrine that each state "may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of water for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state". Kansas v. Colorado, 206 U. S. 46, 94 (1907); see, too, United States v. Rio Grande Irr. Co., 174 U. S. 690, 702 (1899); United States v. Central Stockholder's Corp. of Vallejo, 52 F. (2d) 322, 329 (C. C. A. 9, 1931); 2 Kinney, Water Rights (2d ed. 1902), sec. 817.

Whether or not the riparian rights of owners of land acquired from the government under the Desert Land Act itself are affected by the Act we need not consider, since there is no suggestion that plaintiff's lands were so acquired. We conclude that the Desert Act of 1877 did not require the State of Oregon to abandon the rule of "continuous flow" as to all riparian lands in that state settled on and patented after its enactment.

Whether Hough v. Porter should be deemed an authoritative determination of Oregon law as to the relative rights of appropriators and riparian owners of such lands, notwithstanding what we deem to be the erroneous reasons on which alone it is based, and if so, whether it should be followed

in the federal courts although involving a change of the common law in force in 1885, the date of the government patent, by court decision rendered in 1909, we need not decide, if the Hood River case and the Water Code of 1909 can withstand plaintiff's attacks on constitutional grounds.

4. We proceed then to a consideration of plaintiff's principal contention, that the riparian right to the continuous flow of the stream is a property right which became vested in its predecessors and was passed on to it, and that to deprive it thereof either by legislation or by judicial decision would violate its federal constitutional rights. Clearly riparian rights are substantial property rights which may not be arbitrarily destroyed; they may be taken, for example, under the laws of Oregon and of other states in eminent domain proceedings. Or. Laws 1891, p. 52, sec. 8; Umatilla Irrigation Co. v. Barnhart, 22 Or. 389, 30 Pac. 37 (1892), Mansfield v. Balliett, 65 Ohio St. 451 (1902); St. Helena Water Co. v. Forbes, 62 Cal. 182 (1882). Like other property, however, riparian rights are subject to the police power of the state and within reasonable limits may be modified by legislation passed in the interest of the general welfare.

In several western states where the common law rule of riparian rights was first adopted and then wholly or partly abandoned for the doctrine of appropriation, the question of the extent to which existing riparian rights may be and are thereby

affected has been considered. In Clark v. Cambridge & A. Irr. & Imp. Co., 45 Neb. 798, 64 N. W. 239 (1895), the plaintiff, a lower riparian owner, sought to enjoin interference with his use of the stream for power purposes by the defendant which claimed a right of appropriation under the Irrigation Act of 1889; this act provided: "The right to the use of running water flowing in a river, . . . may be acquired by appropriation by any person . . . provided that in all streams not more than twenty feet in width, the rights of riparian proprietors are not affected by the provisions of this act." Although the stream in question exceeded twenty feet in width the statute was held to be ineffective to impair the plaintiff's riparian rights, because, "assuming such to have been the intention of the legislature, it is a clear invasion of private rights, and within the prohibition of the constitution". In Crawford Co. v. Hathaway, 67 Neb. 325, 343, 93 N. W. 781, 787 (1903), other irrigation statutes of the state were construed to authorize the condemnation of riparian water rights but not otherwise to impair them, because "the rights of riparian proprietors to the use of the waters flowing in the stream to which their lands are adjacent when once attached, is a vested right of property, . . . of which the owners cannot rightfully be deprived or divested except by grant, prescription, or condemnation, with compensation by some of the means and methods recognized by law for the taking or damaging of private property for public use".

A similar construction was applied on like grounds to the Kansas statutes, permitting water to be appropriated for purposes of irrigation, in Clark v. Allaman, 71 Kan. 206, 80 Pac. 57 (1905), and to Texas appropriation statutes in McGhee Irrigating Ditch Co. v. Hudson, 85 Tex. 587, 591, 22 S. W. 398, 967 (1893). See, too, Barrett v. Metcalfe, 12 Tex. Civ. App. 247, 33 S. W. 758 (1896).

In St. Germain Irrigating Co. v. Hawthorn Ditch Co., 32 S. D. 60, 143 N. W. 125 (1913), in a suit by one claiming as an appropriator under the statute against several defendants, some of whom claimed the right to use the water of the stream as riparian owners, it was held that a statute requiring any one seeking to make a beneficial use of water, to secure a permit from the state engineer, was invalid as to riparian proprietors, because it conflicted with the state constitutional provisions protecting private property. The court said:

> "The right of a riparian owner to make a reasonable beneficial use of the waters of a flowing stream for domestic and irrigation purposes is a vested property right and is entitled to protection to the same extent as property rights generally".

It should be noted that the riparian right of which the court is speaking in this case is the affirmative right to use the water for certain purposes not the right to prevent others from diverting it.

In Nielson v. Sponer, 46 Wash. 14, 89 Pac. 155

(1907), a statute providing that "the person upon whose lands the seepage of spring waters first rise shall have a prior right to such waters, if capable of being used upon his lands", did not justify an upper riparian owned upon whose lands a stream so originated, in using up the water for irrigation so as to prevent its use for ordinary domestic purposes by lower riparian owners whose lands had been patented before the statute.

In Boquillas Land & Cattle Co. v. Curtis, 11 Ariz. 128, 89 Pac. 504 (1907), the plaintiff, relying upon its common law riparian rights, sought to enjoin the defendants from entering upon its land for the purpose of reconstructing a dam and diverting water in accordance with an appropriation made before the plaintiff had made any use of the water of the stream. The first legislature of the Territory of Arizona had provided in 1864, that "the common law of England so far as it is not repugnant to or inconsistent with the Constitution and laws of the United States or the Bill of Rights or the laws of this territory is hereby adopted and shall be the rule of decision in the courts of this territory". The Bill of Rights, however, provided: 'All streams, lakes, and ponds of water capable of being used for the purpose of navigation or irrigation are hereby declared to be public property, . . .' In 1887, the legislature enacted that "the common law doctrine of riparian water rights shall not obtain or be of any force or effect in this territory". The Supreme Court of Arizona denied plaintiff's claim of ripa-

rian right on the alternative grounds that the common law doctrine of riparian rights had never applied in the Territory of Arizona, and that "where the legislature has, subject to future legislation, conferred rights to the use of water from flowing streams upon riparian owners, the latter cannot be said to be vested in such a sense as that they may not be subsequently abrogated by statute; at any rate when the riparian owner has made no use of the water permitted him at common law". The Supreme Court, 213 U. S. 339 (1909), in affirming the state court, rested the decision entirely on the first ground and did not consider the contention that the Act of 1887, as interpreted by the Arizona court, deprived the plaintiff of property without due process of law.

When states which recognize the doctrine of prior appropriation, adopt a system for the administrative determination of water rights, the question has been raised whether or not the new system applies to water rights theretofore acquired. In Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258 (1900), the contention that the declaration in the Constitution of Wyoming that all natural waters were the property of the state and the provisions of the Water Act of 1890 establishing a Board of Control for the adjudication of water rights, could not validly be so applied, was overruled; the court said:

> "Where various rights are connected with the same stream or body of water, a subsequent

claim cannot be successfully regulated without including in the regulations all rights. The water to which the use of each attaches is public, and the people as a whole are intensely interested in its economical, orderly, and inexpensive distribution". See, too, Ormsby County v. Kearney, 37 Nev. 314, 142 Pac. 803 (1914); Humboldt Land & Cattle Co. v. Allen, 14 F. (2d) 650, 654 (D. C. Nev., 1926), aff. 274 U. S. 711 (1927).

Despite the emphasis in some state decisions on the necessity of preserving riparian rights from impairment by judicial or legislative action, it cannot be doubted that in the course of the development of western water law, previously recognized riparian rights have been subjected to various modifications by legislative and by judicial action. After holding in Vansickle v. Haine, 7 Nev. 249, (1872), that the legislative adoption of the common law included the common law doctrine of riparian rights, the court overruled this decision and in Jones v. Adams, 19 Nev. 78, 6 Pac. 442 (1885), adopted the rule of prior appropriation. See, too, Reno Smelting, Milling & Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. 317 (1889). In Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923), the court, departing from earlier general expressions in its opinions, held that a riparian owner was not entitled as against an appropriator, to the undimin-

ished flow of the stream if that flow was not of substantial benefit to him, it said:

> "... while this court has recognized the common law riparian rights, it has also modified and enlarged upon that doctrine by ingrafting upon it the necessity of beneficial use by the riparian owner, refusing relief where the riparian owner was not substantially damaged, and granting relief where he was either presently or prospectively damaged."

And in Proctor v. Sim, 134 Wash. 606, 236 Pac. 114, 117 (1925), the same court said:

> "For years past the trend of our decisions and the tenor of our legislation have been to restrict and narrow the common law of riparian rights ...";

in harmony with that development, the provision of the 1917 Water Code of that state, saving "the existing rights of any riparian owner" was construed to protect only "the right to the beneficial use of such portions of the waters of the lake as are either directly or prospectively, within a reasonable time, proper and necessary for the irrigation of their lands and for the usual domestic purposes". For other instances of judicial modification of riparian rights see the opinion of Judge Coshow in the Hood River case, 114 Or. at 193, 227 Pac. at 1091.

In California, it has often been emphasized that riparian rights are substantial property rights which cannot arbitrarily be impaired or destroyed. It is

recognized, however, that like other property rights, they are subject to the police power of the state and may be modified within reasonable limits when the general welfare requires.*

In Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 Pac. 607 (1926), the court sustained the right of plaintiffs, lower riparian owners, to prevent defendants, upper riparian owners, from impounding the waters of the stream so as to deprive the plaintiffs of the benefits of annually recurring floods and freshets. In conformity with Palmer v. Railroad Commission, 167 Cal. 163, 138 Pac. 997 (1914), and San Bernardino v. Riverside, 186 Cal. 7, 198 Pac. 784 (1921), the court held that the defendant's right of appropriation under the Civil Code, secs. 1410-1422, was subordinate to prior vested riparian rights in the natural flow of the stream. The defendant also contended that the plaintiff's riparian rights were limited by sections 11 and 42 of the Water Commission Act of 1913, which declared that all waters not applied to a "useful and beneficial purpose" or reasonably needed for such purposes were subject to appropriation in accord-

*For valuable discussions of present problems of California water law see Bingham, Some Suggestions concerning the California Law of Riparian Rights (1934) 22 Cal. L. Rev. 251, and Comment (1934) 22 Cal. L. Rev. 333. For earlier discussions see Wiel, Pending Water Amendment to California Constitution and Possible Legislation (1928) 16 Cal. L. Rev. 170, 257; Treadwell, Modernizing the Water Law (1928) 17 Cal. L. Rev. 1.

ance with the provisions of the act, and that the term "useful or beneficial purposes" should not "be construed to mean the use in any one year of more than two and one-half acre feet of water per acre in the irrigation of uncultivated areas of land, . . ." The court held section 11 inapplicable because the flood waters were beneficial to the plaintiffs and held the limitation in section 42 to two and one-half acre feet invalid on the ground that to allow the legislature to determine the extent to which riparian owners could claim the beneficial use of water "would be to concede to the legislative department of the state government the arbitrary power to destroy vested rights in private property of every kind and character". To this holding, however, the Court added the qualifications:

> "* * * If the state were here essaying to uphold an effort on its part to work out impartially, unselfishly and in the interests of the whole people some general plan or system for the equitable adjustment of rights and uses in its flowing streams with a view to the conservation, development, and distribution of the dynamic forces and generative and fertilizing fructibilities of their waters, it might well be argued that public policy, public interest, and a most liberal interpretation of the police powers of the state might rightfully be invoked in support of such an effort." 200 Cal. at 120, 252 Pac. at 623.

Justice Shenk dissented on the ground that sections 11 and 42 constituted valid regulations in the in-

terest of the conservation of the waters of the state and that under those sections, a wasteful use of water by a riparian owner could not prevent a reasonable use by an appropriator.

In Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 Pac. 444 (1927), the plaintiff, seeking to establish that its right of appropriation under the Act of 1913 was superior to the riparian right of the defendant who was already using the flow of the stream for power purposes, contended that the Act of 1913 was an exercise of the police power of the state which justified such a subordination of riparian rights. As to this, the court said:

> "We need here only say that the legislative department of the state may not take any portion of a vested property right from one person and invest another with it and be justified in so doing, in view of the provision of sections 13 and 14 of article 1 of the State Constitution and the Fourteenth Amendment of the United States."

But again the court added the qualification:

> "We are by no means intending to say that riparian rights may not under proper circumstances yield to the police power in the interest of public health, safety, comfort, or welfare, but the Act of June 16, 1913, does not purport to be an exercise of such power for any purpose nor do the facts in the present case give rise

to a situation where the police power may operate." 202 Cal. at 67, 68, 259 Pac. at 449.

Justice Shenk concurred in the decision, on the ground that the waters of the river had already been applied to a beneficial use by defendant and others before the application of plaintiff's predecessor in interest, but dissented from the court's assumption that the Water Commission Act of 1913 had not, as an exercise of the police power, effected a modification of riparian rights.

Finally, in Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 Pac. (2d) 5 (1933), the plaintiffs, riparian owners, sought to prevent defendants from impounding and diverting, under their claimed right of appropriation, water from the water shed of the Santa Ynez River above plaintiff's lands. The decision of the lower court denying the relief prayed, was affirmed primarily on the ground that the defendants disclaimed any intention of impounding the ordinary flow of the river, but limited themselves and were also limited by the decree to the right of impounding storm waters in excess of the ordinary and usual flow. Plaintiff, however, also urged that as against a non-riparian appropriator, a riparian owner was entitled to insist upon the undiminished flow of the stream, no matter how slight both the benefit of such flow and the damage of the threatened diversion might be. The court, conceding that this was a fair statement of the effect of the previous California decisions, held that this rule had been modified by a constitutional amend-

ment,* adopted in 1928, after the Herminghaus and Fall River cases, and that, in consequence, the rule of reasonable use now applied as between riparian owner and non-riparian appropriator. To the contention that the Amendment so interpreted was a violation of the state and federal constitutional guaranties against deprivation of property without compensation, the court answered:

> "It was because this court felt impelled to adhere to the long-established rule of Lux v. Haggin, that a constitutional amendment was made necessary. * * *"

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*California Constitution, art. 14, sec. 3:

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are,

"* * * There is a well recognized and established distinction between a 'taking' or 'damaging' for public use and the regulation of the use and enjoyment of a property right for the public benefit. The former falls within the realm of eminent domain, and the latter within the sphere of the police power. That the constitutional amendment now under consideration is a legitimate exercise of the police power of the state cannot be questioned. It is the highest and most solemn expression of the people of the state in behalf of the general welfare. The present and future wellbeing and prosperity of the state depend upon the conservation of its lifegiving waters. * * *

"* * * The conservation of other natural resources are of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence. The police power is an attribute of sovereignty and is founded on the duty of the state to protect its citizens and provide for

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or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

the safety, good order, and wellbeing of society. It is co-extensive with the right of self-preservation in the individual. * * *

"In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health, without specific regard to the general welfare. Under modern conditions it includes the general welfare which embraces regulations 'to promote the economic welfare, public convenience, and general prosperity of the community.' Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592. . . . * * *

"* * * As already observed the amendment purports only to regulate the use and enjoyment of a property right for the public benefit, for which reason the vested right theory cannot stand in the way of the operation of the amendment as a police measure. A vested right cannot be asserted against it because of conditions once obtaining. * * *

* * * * * * *

"There is nothing novel about the limitation of the riparian right to a reasonable, beneficial use of water. Other western states which first adopted the common-law doctrine of riparian rights have effectually changed it to meet modern conditions.

* * * * * * *

"Oregon in 1909 checked the extension of the old common-law doctrine of riparian rights, recognizing, however, certain rights secured

> prior to 1877. Hough v. Porter, 51 Or. 318, 95 P. 732, 98 P. 1083, 102 P. 728. Thereafter the Legislature adopted a water code limiting the riparian owner to a reasonable beneficial use. The code was upheld. In re Willow Creek, 74 Or. 592, 144 P. 505, 146 P. 475. Its constitutionality was again affirmed in re Hood River, 114 Or. 112, 227 P. 1065." 217 Cal. at 700-704, 22 Pac. (2d) at 16, 17.

It has long been generally recognized that the establishment of an administrative system for the regulation and determination of water rights, such as that adopted by Oregon Water Code of 1909, is a legitimate exercise of the police power of the State. 2 Wiel, Water Rights in Western States (3d ed. 1911) §1184, p. 1097; Freund, Police Power (1904) §§414-417. The intensity of the public interest involved is indicated by the provisions in the constitutions and statutes of western states declaring the waters of natural streams and lakes to be the property of the public or of the state. Colorado Constitution, art. XVI, sec. 5; Wyoming Constitution, art. VII, sec. 1; Utah Rev. Stats. (1933) sec. 100-1-1, Nev. Comp. Laws (1929) sec. 7890; Neb. Comp. Stat. (1929) sec. 46-502; 3 Or. Code Ann. (1930) sec. 47-401; see Lasky, From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration (1929) 1 Rocky Mt. L. Rev. 161, 174-187. The Oregon Code of 1909 itself purported to be an exercise of the police power of the state as shown by Section 74:

"Emergency.—Whereas, there is great uncertainty existing throughout the State with reference to the water rights of various parties along the streams, ditches and waterways as to their several interests therein, entailing expensive litigation and engendering many animosities and much bad blood, thereby endangering the public peace and safety of many sections of the State, and Whereas, it is urgent that these conditions be remedied for the preservation of the public peace, health and safety of the State, this act shall be in full force and effect from and after its approval by the Governor."

For a similar emphasis upon the peace of the community as one of the purposes to be achieved by water regulation, see White v. Reservoir Co., 22 Colo. 191, 197, 43 Pac. 1028, 1030 (1896).

The question is whether or not the modification of riparian rights effected by the Statute of 1909, as construed by the Court in the Hood River case could reasonably be regarded as essential to the accomplishment of the ends sought to be achieved by such legislation. That those ends may properly include the economic welfare of the community, as well as its peace, health and safety is, of course, well established. Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 436, 437 (1934). It cannot be doubted that the economic welfare of the people of Oregon was one of the principal aims sought to be promoted by the Water Code of 1909. Some of the most fully developed parts of the state, notably the

Hood River valley east of the Cascade Mountains, the Rogue River Valley, and the valley of the Umpqua River are said to owe their development as fruit raising districts entirely to irrigation. See p. 58 of Brief on merits filed by the Attorney General of Oregon in the Supreme Court in Columbia-Deschutes Power Co. v. Stricklin, supra. We have the emphatic word of the majority of the Oregon Court that modification of riparian rights was necessary to the effectuation of that purpose and that the preservation of such a right as plaintiff is claiming would "take the heart out of the Water Code". This judgment of the state court, familiar as it is with the local conditions that called forth this legislation, is in itself entitled to great respect as evidence of the reasonableness and necessity of such interference with private rights. See Welch v. Swasey, 214 U. S. 91, 105, 106 (1909); Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365 (1909). It also serves to distinguish the present case from cases hereinabove cited, in which the state court either construed the statute as inapplicable to riparian rights theretofore acquired, or held it unconstitutional as so applied. In those states, the need for a complete change in the water law may have been deemed less exigent.

Under the common law, the right of the riparian owner is to the usufruct of the water and not to the water itself. Legislation limiting the right to its use is in itself no more objectionable than legislation forbidding the use of real property for certain

purposes. Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); Gorieb v. Fox, 274 U. S. 603 (1927); see, too, Marblehead Land Co. v. City of Los Angeles, 47 F. (2d) 528 (C. C. A. 9, 1931). To argue, as plaintiff does, that riparian rights are real property rights which attach to the land, does not put such rights beyond the reach of the police power. Chicago & Alton R. R. v. Tranbarger, 238 U. S. 67 (1915), see Block v. Hirsch, 256 U. S. 135, 155 (1920). This is not a case where a right of action had accrued on the basis of the previous law before it was superseded by the legislation under attack. Cf. Ettor v. Tacoma, 228 U. S. 148 (1913); Forbes Boat Line v. Board of Commrs., 258 U. S. 338 (1922). That the common law rights to the relative use of certain natural resources may be modified in the interest of securing fairer distribution thereof as well as of preventing physical or economic waste is established by Champlin Refining Co. v. Corp. Commission of Okla., 286 U. S. 210 (1931) and cases cited therein at p. 234. See, too, F. C. Henderson v. R. R. Comm. of Tex., 56 F. (2d) 218 (W. D. Tex. 1932).

In Hudson Water Co. v. McCarter, 209 U. S. 349 (1908), the right of a state, in the exercise of its police power, to modify existing riparian rights has been even more explicitly established. The Attorney General of the State of New Jersey filed an information in the State Court to enjoin the defendant from carrying waters of the Passaic River out of the state, contrary to a prohibitory statute.

Defendant contended that the statute violated its right as a riparian owner to divert whatever water it desired from the stream in as much as there were no objecting riparian interests below. The New Jersey court sustained an injunction on the ground that the common law recognized no such riparian right and that the State of New Jersey itself had a proprietary interest in the stream giving it the right to object to the diversion. 70 N. J. Eq. 695. Expressly disclaiming any intention of casting doubt upon the ground of the state court's decision, the Supreme Court stated that it preferred to rest its affirmance upon the broader ground of the police power of the state. Mr. Justice Holmes said:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it

cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

"* * * But it is recognized that the State as Quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. * * *

"The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the

> cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same."

The modification of riparian rights which the Act of 1909 has effectuated is not so drastic a change as to amount to taking of property without due process of law. See Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415 (1922). At common law, the usufruct of the riparian owner was not absolute; it was conditioned on the equal right of every other riparian owner to the use of the water. By the Oregon legislation, his usufructuary privileges were not destroyed; his right of access to and to the equal use of the waters for ordinary domestic purposes were preserved. Re Water Rights of Hood River, 114 Or. at 190, 227 Pac. at 1089. This legislation, however, has changed the conditions under which the riparian owner's privilege otherwise to use the water may be exercised. On the one hand, his unrestricted right reasonably to use his fair share of the waters for beneficial purposes is now subordinated to a prior appropriation for beneficial purposes. On the other hand, he is no longer limited in such beneficial use to his fair proportion of the waters over and above those needed for domestic purposes by all riparian owners; and as a riparian owner, he is in a peculiarly advantageous position to exercise the right of appropriation. The statute can-

not be said to take away property from one in order to give it to another, even though the effect of the operation of the statute in a specific case may be so to transfer the privilege of making some specific use of the water.

We conclude then, that the riparian owner's right to the natural flow of the stream substantially undiminished has been validly abrogated by the Water Code of 1909 as construed by the Oregon court. Plaintiff's assertion of such a right in this case cannot, therefore, be sustained.

5. The record does not justify us in differing with the district judge who deemed that the injunction as granted would suffice to preserve plaintiff's access to the water and its enjoyment of "the residual rights guaranteed by the modified riparian right doctrine". Plaintiff asserts that the chief value of its lands, due to their location, lies in their availability for power purposes, and that they cannot be so utilized if defendant be permitted to consummate its alleged wrongful acts. Any loss of this value would, however, be damnum absque injuria; it would be due to defendants' forehandedness in obtaining the certificates and permits that give them priority in putting the waters of the river to a beneficial use.

It is not clearly apparent whether plaintiff claims that removal of the rock blasted and to be blasted either of itself or combined with the maximum operation of the plant will cause such a diversion as substantially and permanently to move the thread of the stream toward defendant's land or will cause

only an intermittent change dependent upon defendant's actual operations of its proposed plant and the stage of the river. In either case, however, plaintiff has no legal cause for complaint or for further injunctive relief, even though, if such change were permanent, it would alter the relation of plaintiff's western boundary line to the thread of the river. While with a gradual change, the thread of the river continues to be the boundary line between opposite riparian owners, with a sudden and apparently permanent change, the boundary remains as theretofore, that is, at the line of the thread of the former main channel and not at the thread of the new channel. Wyckoff v. Mayfield, 130 Or. 687, 280 Pac. 340 (1929). The riparian owner has no legal right in Oregon to the continuance of the thread of the stream as his boundary.

Defendants' proposed diversion of the water, pursuant to the certificates and permits of appropriation for beneficial purposes and the blasting on and removal of the rock from their own part of the river bed in the accomplishment of this purpose, will violate none of plaintiff's rights, provided defendants maintain the water level prescribed in the injunction as granted. If plaintiff's fears that defendants, in the operation of the power plant, will violate the injunction to its damage, should be realized, the remedy that will give plaintiff full protection is readily available. Such fears justify neither a reversal nor a modification of the degree.

Decree affirmed.

[Title of Cause.]

WILBUR, Circuit Judge, dissenting;

I concur in that portion of the main opinion which construes the Desert Land Act of March 3, 1877 (19 Stat. 377, 43 U. S. C. A. §321).

The main opinion relies largely on the Hood River case, 114 Ore. 112, adjudicating the rights of claimants to water in the Hood River of Oregon. This case dealt with the power rights of the Pacific Power & Light Company. The court held that the Pacific Power & Light Company, although the owner of riparian land on both banks of the Hood River was not entitled to the undiminished flow of the river through their land under the law of Oregon, and that the common law doctrine of riparian rights was to that extent inapplicable to the conditions in Oregon. The court also held that the Pacific Power & Light Company had no right to power by reason of its riparian ownership because it had not used the power prior to the enactment of the water code of 1909. As the decision in the main opinion is based very largely upon the decision of the Supreme Court of Oregon in the Hood River case I proceed to state the reasons why I agree with the first conclusion of the Supreme Court of Oregon, and of the majority of the court in the case at bar, in holding that the right of the riparian owner to an undiminished flow of water through his land in order that he might use the same for the development of power, is subordinate to the right of those

who have appropriated water for irrigation purposes above the land in question. I will follow this discussion by a statement of the reasons why I disagree with the conclusion of the majority in the case at bar holding that the riparian right of the appellant is subordinate to the claim of appropriation of water for power purposes made subsequent to the grant of appellant's riparian right to use the water for power purposes.

As pointed out by the Supreme Court of Oregon in the Hood River case, to hold that the common law doctrine of the right of riparian owners to the full and undiminished flow of the stream is applicable, would prevent the use of water for irrigation because of any use of water for irrigation necessarily diminishes the flow of the stream below the point of diversion. As pointed out by Judge Bean, the author of the majority opinion in the Hood River case:

> "[23, 24] The very essence of the common law is flexibility and adaptability. It does not consist of fixed rules, but is the best product of human reason applied to the premises of the ordinary and extraordinary conditions of life, as from time to time they are brought before the courts. Although the common law is homogeneous, yet it finds widely different expression in different jurisdictions. If the common law should become so crystallized that its expression must take on the same form wherever the com-

mon law system prevails, irrespective of physical, social, or other conditions peculiar to the locality, it would cease to be the common law of history, and would be an inelastic and arbitrary code. It is one of the established principles of the common law, which has been carried along with its growth, that precedents must yield to the reason of different or modified conditions."

A good illustration of this rule of adaptation is in the Town of Antioch v. Williams Irr. Dist., 188 Cal. 451, 462, 465, where Chief Justice Shaw, speaking for the court said:

"In this state the climate, the original ownership of the land, the policy of the governments of the United States and the state, the original owners, regarding the use and occupancy thereof for mining purposes by persons not in privity with them, and the necessity of water for placer mining and irrigation, are all so different from the conditions existing in Great Britain, where the common law had its origin, that the court from the first has had some difficulty in applying it here without producing the injustice or wrong which it is the chief purpose of the common law to prevent or redress. It has frequently been necessary to invoke the maxim of jurisprudence that 'where the reason of a rule ceases, so should the rule itself,' and this maxim has been incorporated

into the Civil Code. (§3510) It is as much a part of the common law as are the rules concerning the right of appropriation of water."

p. 465:

"Similar unprecedented conditions were presented in Katz v. Walkinshaw, 141 Cal. 116 (99 Am. St. Rep. 35, 64 L. R. A. 236, 70 Pac. 633, 74 Pac. 766), and the numerous cases following it. It was there said that 'whenever it is found, that, owing to the physical features and character of this state, and the peculiarities of its climate, soil, and productions, the application of a given common law rule by our courts tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice on which that law is founded, and which its administration is intended to promote, require that a different rule should be adopted'."

If a court can apply the rule of reason in defining the rights of a riparian owner, and declare that changed conditions demand a change in the rights of a riparian owner, it would seem to follow that the legislative branch of the government could also declare and define the rights of a riparian owner so long, and, I think, only so long as the legislation is a reasonable adaptation of the common law rule to the conditions obtaining in the state, assuming of course that the state has followed the common law

in defining the rights of riparian owners. In Shively v. Bowlby, 152 U. S. 1, (38 L. Ed. 331, 350, 14 Sup. Ct. Rep. 548, see also Rose's U. S. Notes), Justice Gray, speaking for the court, said:

> "The settlers of Oregon, like the colonists of the Atlantic States, coming from a country in which the common law prevailed to one that had no organized government, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefore, is based on the common law." See also Lytle v. Hulen, 128 Or. 483, 510.

The common law doctrine of riparian rights was fully and completely adopted by legislation (Territorial Act, June 7, 1844, Laws of Oregon 1843-1849, p. 100, and by its Constitution, Art. 18, Sec. 7, and by judicial decisions of the state of Oregon, as will appear by the following quotation from the decisions of the Supreme Court of Oregon and from our own decisions. In United States F. & G. Co. v. Bramwell, 108 Or. 261, 217 Pac. 332, the Supreme Court of Oregon said:

> "The common law of England, modified and amended by English statutes, as it existed at the time of the American Revolution, as far as it was general and not local in its nature and applicable to the conditions of the people and not incompatible with the nature of our polit-

ical institutions or in conflict with the Constitution and laws of the United States or of this state, except as modified, changed or repealed by our own statutes, has been adopted, and is in force in this state. Perry v. Fletcher, 93 Or. 43, 182 Pac. 143."

In Eastern Oregon Land Co. v. Willow River Land & Irrig. Co., 201 Fed. 203, 213, this court said:

"It will not be necessary to enter into a discussion of the statutes and various decisions of the Supreme Court of Oregon defining riparian rights in that state. We will accept the opinion of the learned District Judge in this case upon that question that:

'The riparian proprietor is entitled to the ordinary and usual flow of a stream as long as it is of any beneficial use to him and this may, under some circumstances, include flood or overflow waters reasonably to be anticipated during ordinary seasons.'"

The decision referred to is that of Judge Bean of the District Court of the United States for the District of Oregon, 187 Fed. 466, and is as follows:

"The general doctrine of riparian rights is too firmly established in this state to be shaken now by judicial decision. It is useless to cite authorities. The riparian proprietor is entitled to the ordinary and usual flow of a stream as long as it is of any beneficial use to him. * * *".

In Harris v. Southeast Portland Lumber Co., 123 Ore. 549-556, 557, 262 Pac. 243, it is said:

> "In Weiss v. Oregon Iron & Steel Co., 13 Ore. 496, 11 Pac. 255, this court, speaking through Mr. Justice Lord, said:
>
> 'Riparian proprietors are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration. * * * The general principle is, that every owner of land through which a natural stream of water flows has a usufruct in the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, without unreasonable detention or substantial diminution in quantity or quality, and none can make any use of it prejudicial to the other owners, unless he has acquired a right to do so by license, grant, or prescription.' "

After making the foregoing quotation from the 13th Oregon, the opinion in the Harris case, continues:

> "The rights claimed in this suit are purely riparian in their nature and, as such, each proprietor, in the absence of grant, license or prescription limiting his rights, may insist that the stream shall flow to his land in the usual quan-

> tity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its usual level, and this right is a right of property inseparably annexed to the soil itself and exists jure naturae as parcel of the land, which right will not be suspended or destroyed by mere nonuser, although it may be extinguished by the long continued adverse enjoyment of others: Gould on Waters (3d ed., §204). The evidence of a right by prescription 'ought always to be clear and conclusive'. MacRae v. Small, 48 Ore. 139, 85 Pac. 503."

This was fully recognized by a majority of the court in the Hood River case, the majority adopting the statement of Judge McCourt in his dissent, as follows:

> "Comparatively early in the judicial history of the state, this court by its decisions enforced and applied the common law doctrine of riparian rights, as defined and established by the American and English cases and by eminent text writers. Or. Iron Co. v. Trullenger, 3 Or. 1 (1867); Taylor v. Welch, 6 Or. 198 (1876); Hayden v. Long, 8 Or. 244 (1880); Coffman v. Robbins, Colohan, 12 Or. 239, 6 Pac. 503 (1885); Weiss v. Or. Iron Co., 13 Or. 496, 11 Pac. 255 (1886)."

The majority also held that the Water Code of 1909 did not unreasonably interfere with the vested ri-

parian rights of a riparian owner to develop power by recognizing the rights of appropriators above to divert some of the water to the prejudice of the fullest exercise of the right of the lower riparian owner as recognized by the common law of England, upon the theory that a state either by judicial decision or legislation may reasonably construe or apply the doctrine of common law riparian rights. I am willing to concede that the right of riparian owners to the use of the entire flow of a stream for power purposes in Oregon was subordinate to the right of upper riparian owners to use water for irrigation and am inclined also to agree with the holding of the Supreme Court of Oregon in the Hood River case that it was also subordinate to the right of the state to permit appropriation of water above the riparian land for beneficial use in irrigation. The question involved in the case at bar, however, does not involve a conflict between a riparian owner claiming power rights and upper riparian owner or appropriator claiming the right to use water for irrigation. It is a conflict between the owners of the adjoining banks of a stream to power developed by the stream in its flow along the stream bed which belongs jointly to the parties to the action. The appellee bases its right to use the water for power purposes, not upon its riparian right which obviously is no greater than that of the owner of the adjoining bank of the stream, but upon a permit issued by the state engineer giving it a right to use the water

of the stream for power purposes. It is claimed that this permit gives it a right superior to the riparian owner and this would be equally true whether the appellee were a riparian or merely an appropriator recognized by the state officials. I do not believe the legislature of the state has the power to divest the right of the appellant to the use of the water flowing across his land for power purposes and to grant that right to the owner of the opposite bank or to a third person. I will now state my reasons for this conclusion:

Where patents to government land were issued and rights thereby vested in a riparian owner to the usufruct of the water, the question of whether or not the act of the state or of private individuals acting under its authority is a taking of private property within the meaning of the 14th amendment, is necessarily one to be determined by the courts and ultimately of course by the Supreme Court of the United States. The federal courts must exercise their own independent judgment in the matter, as stated by the Supreme Court in Chicot County v. Sherwood, 148 U. S. 529, as follows:

> "In Hyde v. Stone, 61 U. S. (20 How.) 170, 175, it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the

distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam v. Broadnax, 39 U. S. (14 Pet.) 67; Union Bank of Tennessee v. Vaiden, 59 U. S. (18 How.) 503.' This principle has been steadily adhered to by this court."

That serious interference with riparian rights is a taking of property in violation of the 14th amendment to the Constitution is recognized and decided by the Supreme Court of Oregon in Logan v. Spalding Logging Co., 100 Ore. 731, 736, 190 Pac. 349, where it is stated:

"It will be observed that the doctrine thus announced clearly asserts that interference with the natural flow of the stream, insofar as it injures the riparian proprietor, or interferes with his enjoyment of his right to the use of the stream, is a taking pro tanto of his property, which is governed by the constitutional provision above quoted. This statement of the law has been affirmed by this court in Trullinger v.

> Howe, 33 Ore. 219, 97 Pac. 548, 99 Pac. 880, 22 L. R. A. N. S., 545, and Flynn v. Vaughn, 55 Or. 372, 106 Pac. 642, and must be taken as the settled law in this state, regardless of what may have been the holding in some other jurisdiction."

I will return to a consideration of that question after calling attention to the fact that in the case at bar we are presented with a most unusual situation where the controversy is not between upper appropriators, or riparian owners, and a lower riparian owner, as in the Hood River case, but between adjoining riparian owners as to the right to use the hydraulic power due to the fall of water as it passes over their land. No one doubted in the Hood River case that a riparian owner, owning all the riparian lands along the stream was entitled to hydraulic power thereon due to the fall of the stream while on its property. This was assumed in the decision and is well established by the common law. The common law rule is stated by the Supreme Court in U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1141:

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, Sec. 439): 'Every proprietor of lands on

the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. Aqua currit et debet currere ut currere solebat is the language of the law. Though he may use the water while it runs over his land as an incident to the land he cannot unreasonably detain it, or give it another direction and he must return it to its ordinary channel when it leaves his estate'."

In Swain v. Pemigewasset Power Co., 85 Atl. 288, 291, the Supreme Court of New Hampshire said:

"The rights of riparian owners at common law to a beneficial use of the water of the river or stream passing through or adjacent to their lands are not open to serious doubt. They are entitled to a reasonable usufruct of the water, or of the power it is capable of developing in consequence of the natural configuration of the bed of the stream opposite their respective lands."

See Kinney on Irrigation and Water Rights, Vol. I, p. 843, §492, as follows:

"The riparian owner also has the right to the use of the water of a stream flowing by his land for the development of power, either by direct power developed from the flow of the water itself, or by the generation of electric energy for the transmission of electricity to other places than at the point where the same is developed upon the stream. The use of any riparian proprietors of the water for this purpose must be reasonable as compared to the like or other uses by other riparian proprietors upon the same stream. If the water is diverted from the stream for the purpose of getting a fall and thus developing power, after its use it must be returned to the stream for the use of the other riparian proprietors below. Any other disposition of the water after use would be termed an unreasonable use of the water."

In the case at bar if one party should acquire the right of the other to the land opposite no one would doubt that the owner of the banks and stream bed would be entitled to develop and use the hydraulic power thereon, so long as the water was returned to the stream undiminished. The appellant contends that the adjoining property holders, owning the land to the thread of the stream which constitutes their boundary are tenants in common to the stream and its bed. Appellant relies upon an early statute of the United States upon that subject, as follows:

"§2476. Navigable rivers within public lands to be public highways.

> All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both. Act May 18, 1796, c. 29, §9, 1 Stat. 468; Act March 3, 1803, c. 27, §17, 2 Stat. 235." (43 U. S. C. A. §931.)

The Supreme Court of the United States in Scott v. Lattig, 227 U. S. 229, said:

> "Thus, Rev. Stat. Sec. 2476, U. S. Comp. Stat. 1901, p. 1567, which is but a continuation of early statutes on the subject (Acts May 18, 1796, 1 Stat. at L. 464, c. 29, §9, U. S. C. S., 1901, p. 1567; March 3, 1803, 2 Stat. L. 229, c. 27, §17), declares: 'All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both;' and of this provision it was said in St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 288, 19 L. Ed. 74, 78, 'the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on

the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways'."

It is not necessary to decide the exact relation of the parties in and to the power, that is, whether it has all the common law attributes of a tenancy in common or otherwise, for it is sufficient to say that each owns a part of the hydraulic power developed along their common boundary and that both together own it all. If then these two adjoining owners are entitled to the entire flow of the stream as it actually reaches their land for the purpose of generating power thereon, can the state legislature take the right of one owner to a part of this power and confer it upon the other in the exercise of the police power of the state? The proposition thus stated carries its own answer, for it has always been held that a state cannot in the alleged exercise of its police power take the property of one person and confer it upon another. As stated by the Supreme Court of North Carolina in Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379:

"No law which divests property out of one person and vests it in another for his own private purposes without the consent of the owner, has ever been held a constitutional exercise of legislative power in any state of the union", citing Cooley Const. Lim. 165; Wilkinson v. Leland, 27 U. S. (2 Pet.) 658, 7 L. Ed. 553;

Satterlee v. Matthewson, 27 U. S. (2 Pet.) 380, 7 L. Ed. 458; Hoke v. Henderson, 15 N. C. 4, 25 Am. Dec. 677; Wales v. Stetson, 2 Mass. 143, 3 Am. Dec. 39; Calder v. Bull, 3 U. S. (3 Dall.) 394, 1 L. Ed. 651; Dash v. Van Kleeck, 7 Johns. 507, 5 Am. Dec. 291; U. S. Const. art. 1, sec. 10; N. C. Const. art. 1, sec. 17; Butler v. Pennsylvania, 51 U. S. (10 How.) 416, 13 L. Ed. 478; Fletcher v. Peck, 10 U. S. (6 Cranch) 137, 3 L. Ed. 178; Stanmire v. Taylor, 48 N. C. 207, 214; King v. Hunter, 65 N. C. 603, 6 Am. Rep. 754; Wesson v. Johnson, 66 N. C. 189; 1 Kent. Com. 455; Stanmire v. Powell, 35 N. C. 312.

In the case at bar the basic right in controversy is the right of the appellees to divert more than 220 second feet of water for power under permits issued by the State Engineer. The right to 220 second feet is not disputed and the right of the appellees to a flow of 75 second feet to be taken from the stream and returned thereto above the land of the appellant is not disputed, but is not involved because it does not affect the amount of power to be developed in the stream along the boundary of the parties. To repeat, the appellees seek to divert 1397 second feet by the canal and head works under construction. Of this 1102 second feet are covered by permits; 220 second feet by a conceded and adjudicated right and 75 second feet under an adjudicated right not available to the ap-

pellees at the proposed point of diversion. That is, the controverted right of the appellees is based upon its action in appropriating this 1082 second feet of water for power purposes. The flow of the stream varies from 60,000 second feet in time of high water to about 600 second feet in time of low water. At low water the appellant would have only about 150 second feet on its land. This amount being assured to it by the provision of the decree requiring a level of 1070 feet at the point of diversion. The appellant's land has no value except that which arises from the riparian right for power purposes. It was purchased by appellant for that purpose. That right is worth $30,000. If the appellees can maintain their right to divert 1347 second feet at all times it will greatly diminish, if it does not absolutely destroy, the value of appellant's land. Can this taking be justified under the police power of the state?

This court has gone very far in recognizing the power of a city to destroy the value of real estate in the exercise of police power. Marblehead Ld. Co. v. City of Los Angeles, 47 F. (2d) 528. But no court, so far as I am advised, has gone to the extent of holding that a state can grant a right to one individual which belongs to another because the first individual first applied for the right. The grant itself assumes title to be in the state and not in the individual. It is only upon this theory that a grant to the first applicant could be justified. Can it be said

that a law which permits an officer of the state to grant rights in private property to the first applicant therefor is a valid exercise of police power? Certainly not, so long as the Constitution forbids the taking of private property without compensation. The Supreme Court of Oregon has not gone this far and its decisions both before and after the Water Code of 1909 recognize that under the Constitution of the United States the state could not divest the property of one person and confer it on another. That court having held in Hough v. Porter, 51 Ore. 318, 95 P. 732, 98 P. 1083, 102 P. 728, that the Desert Land Act of 1877 severed from riparian land all rights to water thereon, and having recognized that right in the public it follows logically that the state could dispose of such waters on behalf of the public so far as riparian owners are concerned. On this theory the appellant, whose predecessor acquired the land by patent from the government after the Desert Land Act was passed, has no riparian right to the power and cannot complain that the owner of the adjoining riparian land has been granted rights inconsistent with its claim to power rights. But we hold that this construction of the federal statute is erroneous and that the appellant's predecessor acquired by his patent a riparian right to water and power under the laws of the United States, which at the time of the grant recognized that the patent to riparian land conveyed such rights to the water as the state at that time recognized. In support of this well established rule I quote from

a decision of the Supreme Court in Brewer v. Elliott Oil & Gas Co. v. United States, 260 U. S. 77:

> "It is true that where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the Public Land Laws may be determined according to local rules; but this is subject to the qualification that the local rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. Thus, the right of the riparian owner under such grant may be limited by the law of the state either to high or low-water mark, or extended to the middle of the stream. Packer v. Bird, 137 U. S. 661, 669, 34 L. Ed. 819, 820, 11 Sup. Ct. Rep. 210.
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> "We said in Oklahoma v. Texas, decided May 1, 1922 (258 U. S. 574, 66 L. Ed. 771, 42 Sup. Ct. Rep. 406): 'Where the United States owns the bed of a non-navigable stream, and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If, by a treaty or statute or the terms of its patent, it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its

conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. When it is disposing of tribal land of the Indians under its guardianship, the same rule applies.'

"In government patents containing no words showing purpose to define riparian rights, the intention to abide the state law is inferred. Mr. Justice Bradley, speaking for the court in Hardin v. Jordan, 140 U. S. 371, 384, 35 L. Ed. 428, 434, 11 Sup. Ct. Rep. 808, said: 'In our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie.' "

Consequently, it was held by the Supreme Court in that case that an act of the state legislature changing the definition of a navigable stream could not retroactively affect the rights of a patentee of government land. I quote from that opinion the following which occurs immediately preceding the above quotation:

"It is not for a state, by courts or legislature, in dealing with the general subject of beds and streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant, or would enlarge what actually passed to the

state, at the time of her admission, under the constitutional rule of equality here invoked."

If the legislature of a state cannot limit the rights of a riparian owner to a stream bed by a definition of navigability inconsistent with its definition at the time a patent was issued, it is equally clear that it cannot take away vested riparian rights by a new definition of such rights limiting the right to the use and appropriation then made. (Clark v. Cambridge & A. Irr., etc., Co., 45 Neb. 798, 64 N. W. 239; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 56 A. L. R. 277 (note).

Assuming, however, that the state in the exercise of its police power may modify the rights of a riparian owner, how far have they been modified by the Water Code of Oregon? Ignoring for a moment the interpretation placed on this code by the Supreme Court of Oregon, it is to be observed that it expressly recognizes *all* vested rights in water. Section 1 provides, "Subject to existing rights, all waters within the state may be appropriated for beneficial use, as herein provided and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, or corporation or association to any water". This declaration is repeated in Sec. 70, subdivision 1, as follows:

"Sec. 70, Vested Rights Preserved.

"1. Nothing in this act contained shall impair the vested right of any person, association or corporation. * * *

"8. * * * This act shall not be held to bestow upon any person, association or corporation any riparian rights where no such rights existed prior to the time this act takes effect."

Sec. 70, sub. 2, provides that "actual application of water to beneficial use prior to the passage of this act by or under the authority of any riparian proprietor, or by or under authority of his or its predecessors in interest shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use; provided such use has not been abandoned for a continuous period of two years."

Sub. 3 recognizes the right of a riparian owner to proceed with his construction of works for the application of water to beneficial use. Now the use of water by a riparian owner is the exercise of a right common to all riparian owners, and is not adverse to them. It is not measured by the needs of the riparian owner, but by the capacity of the stream to supply water to all riparian owners along its banks. Oliver v. Robnett, 190 Cal. 51. The distinction is pointed out by the Supreme Court of Oregon in a late case. In re Waters of the Deschutes River, 134 Ore. 623, 704, from which I quote as follows:

"Where the old riparian right system prevails, a riparian owner using water in that capacity is, in effect, always a tenant in com-

> mon with other riparian owners on the same stream, and the amount to which such riparian owner is entitled varies with the reasonable demands of the other riparian proprietors. In other words, it is not a right to a definite amount of water while an appropriator is always a tenant in severalty and a decree can be rendered under the statute recognizing the right of an appropriator for a definite amount of water."

See also, in re Rights to Use of Waters of Silvies River, 115 Ore. 27, 31, points 32, 33. Hence, insofar as the Water Code recognized as a vested right the right to water appropriated to his own use, and beneficially used by a riparian owner, it did not limit (it expressly disavowed an intent to limit the right), but it extended the right of a riparian owner by recognizing his actual appropriation as creating a right in severalty which might exceed his riparian right, although it is of course true that the appropriation might be less than the riparian right. In the Hood River case, supra, the Supreme Court of Oregon not only held that the riparian right of the Pacific Power and Light Company was subordinate to the appropriations above, but also that the Power Company was not entitled to an adjudication that it had any riparian right because it had not exercised its right prior to the enactment of the Water Code of 1909. So construed, the Water Act by its own force destroyed all riparian rights which had not been beneficially used, solely because of such

nonuse, and this without giving any opportunity to exercise the right after the enactment of the law. So construed in its application to the rights of appellant it is a clear violation of the Fourteenth Amendment to the Constitution. I hold that the Water Code did not and could not wholly destroy the power rights of the appellant. The appellees are not relying upon their riparian power rights. Their action in securing a permit from the State Engineer and their development work in the stream bed is avowedly hostile to the appellant's claim. Their possession is adverse. Upon the completion of their diverting works and the installation of their power plant they will receive a certificate of ownership of the power thus developed, all in utter disregard of the appellant's rights in the stream, and this right of appellees is sustained by the decision of the court below. The decree of the court below is based upon a finding that the appellant failed to establish any water right. This finding of a lack of proof of a right is the equivalent of a finding of no water right, for appellant's case is predicated upon its riparian right which is thus put in proof. This finding and decree would be conclusive in any future litigation between the parties to establish their respective rights.

The exercise of control over water inconsistent with the rights of a riparian owner where the control thus exercised might ripen into an adverse title, has always been held to be sufficient ground for the intervention of a court of equity by way of injunc-

tive relief. As stated by the Supreme Court of Oregon, 13 Ore. 503:

> "Nor do we think the objection to the exercise of the jurisdiction well taken. Mr. High says: 'A riparian proprietor owning to the center of a stream is entitled to the aid of equity to prevent a diversion of the waters from their natural channel. Nor does the neglect of complainants to use or appropriate the water-power, or the fact that they have as yet sustained but small pecuniary damage, or that defendants would be subjected to heavy expense if compelled to restore the water to its original channel, present such objections as would warrant a court of equity in refusing the relief.' (High on Injunction, §795, and authorities cited)."

To deny that relief without reservation would destroy appellant's right and vest a part of it in appellees. On the other hand, if each of the two riparian owners can prevent the other from developing power, neither can do so, and the right is rendered worthless to either or both. It follows that a full recognition of the common law riparian right to full and continuous flow would destroy the right. Here is a legitimate field for the exercise of the police power of the state to give to the owner desiring to utilize his power the right to make the necessary changes on his land to do so. On the other hand, the rights of the appellant should be fully protected. This can be accomplished, I think,

by granting an injunction unless the appellees shall file a disclaimer to more than one-half of the flow of the stream, after the deduction of the flow of 220 second feet to which it has an acknowledged priority, and an agreement to pay a reasonable sum for the use of all water above one-half of the said amount to be fixed by the court, and payable monthly for such power so used for the previous month, the appellees to have the right to use the full flow of 1347 second feet if the water level of 1070 feet permits until such time as the appellant is ready to utilize its one-half of the flow of the stream less 220 feet.

[Endorsed]: Opinion and Dissenting Opinion. Filed Nov. 5, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 6874.

THE CALIFORNIA OREGON POWER COMPANY, a Corporation duly organized and existing under and by virtue of the laws of the State of California,

Appellant,

vs.

BEAVER PORTLAND CEMENT COMPANY, a Corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and CITY OF GOLD HILL, OREGON, a Municipal Corporation, Existing under the laws of the State of Oregon.

Appellees.

DECREE

APPEAL from the District Court of the United States for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Oregon, and was duly submitted;

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellees and against the appellant,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Nov. 5, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Mr. A. E. Reames, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including January 2, 1935; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge.

Dated: San Francisco, California,
December 1, 1934.

[Endorsed]: Filed Dec. 1, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four hundred and eighty (480) pages, numbered from and including 1 to and including 480, to be a full, true and correct copy of the entire record, excluding certain original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of December A. D. 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 4, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Judicial Code, Sec. 128; (36 Stat. at L. 1133, Ch. 231 Comp. Stat. Sec. 1120, 5 Fed. Stat. Anno. 2d ed. page 607; 28 U. S. C. A. Sec. 225).

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The Desert Land Act of March 3, 1877; (19 Stat. 377; 43 U. S. C. A. Sec. 321).

United States Compiled Statutes of 1901, Vol. 2, Sec. 2476, Revised Statutes; (Sec. 9, Ch. 29, Act of May 18, 1796). 43 U. S. C. A. Sec. 931.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

THE CALIFORNIA OREGON POWER COMPANY, *(a corporation)*, *Petitioner*,

vs.

BEAVER PORTLAND CEMENT COMPANY, *a Corporation, and* CITY OF GOLD HILL, OREGON, *a Municipal Corporation*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT (AND BRIEF IN SUPPORT THEREOF)

To the Honorable, the Supreme Court of the United States:

I.

SUMMARY AND STATEMENT OF MATTER INVOLVED

This is a suit in equity brought by petitioner in the United States District Court for the District of Oregon. The petitioner, a resident of the State of California, owning the property involved herein, in Ore-

gon, claimed the jurisdiction of the Federal District Court solely upon the ground of diverse citizenship.

Bill of Complaint is at R. 4.

Rogue River, a meandered, non-navigable stream, flows in a southerly direction through and over the lands of the petitioner and of the respondents, and the thread of said stream as it naturally exists, is the boundary of the lands of the respective parties.

At the place in controversy Rogue River flows in a southerly direction, dividing the respective lands quite equally.

Respondent Cement Company attempts by appropriation permits issued ex parte and by destruction of the channel on its side of the river, to draw all of the water off of petitioner's lands, except enough for a "fishway," thereby changing petitioner's west boundary, moving it westward 100 to 150 feet.

Petitioner claims its lands are riparian and that the common law riparian right attached to them when the patent was issued to petitioner's predecessor, Francis Marion Fredenburg, April 20, 1885. (Defendant's Exhibit W. R. 301-3—Copy of U. S. Patent).

It is admitted that petitioner acquired said lands by purchase, March 11, 1921.

BLASTING OF RIVER BED

On the evening of July 21, 1930, respondent Cement Company, without knowledge or consent of plaintiff, dynamited the bed of the river on its side of the thread

of the stream; it thereby shattered and broke the rock bed of the stream for more than 50 feet up and down the stream, and for more than 50 feet in width, and approximately five to eight feet deep. When enjoined in this case it was removing, and threatening to continue to remove, the shattered rock from the river bed, which act would suck all of the waters of the stream from petitioner's land, into a new channel in the bed of the old channel, to be made by the cleaning out of said blasted area.

With the river in a state of nature, and without removal of the rock from the blasted area, the total water appropriated for the City, (220 second feet on its side, and 75 second feet on petitioner's side of the river), flows naturally into the City's little plant. The blasting and the attempt to remove the rock from the blasted area, was for the purpose of taking the entire 1347 second feet under the Ex parte permits issued by the State Engineer, acting under the Oregon 1909 Water Code. (The 1909 Code is printed in full at Appendix to Brief, pages I to XXXIII, inclusive).

Petitioner claims the common law riparian right to maintain the bed of the stream intact, as adjudicated by the Oregon Supreme Court, and the right to prevent destruction of the channel of said river in front of petitioner's riparian lands; that the removal of the shattered rock in the blasted area would make a new channel for said river, sucking the waters thereof off

petitioner's land, and leaving a dry gravel bar between plaintiff's land and the race or channel which would have been made by the removal of said blasted rock. It asks the aid of equity to protect its vested rights in said riparian lands, and to protect such rights from further depredations. It maintains that the Appellate Court erred as set forth in the following nine "Reasons Relied Upon for the Issuance of the Writ Herein."

II.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

This Court has authority to issue the writ and bring the cause here by certiorari, because the decree of the United States Circuit Court of Appeals for the Ninth Circuit is final by Section 128, Judicial Code, (36 Stat. at L. 1133, Chapter 231 Comp. Stat. § 1120, 5 Fed. Stat. Anno. 2d ed. page 607).

Petitioner relies upon

Meccano v. Wanamaker, 253 U. S. 136, 64 Law ed. 822,

and also upon

Denver v. N. Y. Trust Company, 229 U. S. 123, 131, 136, 57 Law ed. 1101, 1121,

where it is said such rights lie where the Federal Court jurisdiction *depends entirely upon diverse citizenship.* And where it is also said that this is not changed though questions arise under the 14th Amendment, due process clauses, etc., that

The Appellate Court's jurisdiction also depends upon

diverse citizenship, which precludes an appeal to this Court, from the decree of the Circuit Court of Appeals. The case further holds that upon the granting of the writ under circumstances such as these, the whole matter may be determined in this Court.

The petitioner also relies upon

Harriman v. Northern Securties Co., 197 U. S. 244, 287, 49 Law ed. 739, 760, 25 Sup. Ct. Rep. 493.

This and the case of Denver v. New York Trust, supra, are cited in the opinion of Mr. Justice McReynolds in Meccano v. Wanamaker, supra.

Petitioner states the following grounds for the allowance of the writ:

1. The opinion in the instant case is in direct conflict with a decision of this Court in the construction of Section 70 of Oregon's Water Code of 1909, which declares vested rights are preserved. (Code set forth in full in Appendix pages I-XXXIII).

2. The opinion in the instant case is in conflict with a controlling decision of the Oregon Supreme Court (1920), construing Section 4 of Article XI of the Oregon Constitution. (The case is Logan v. Spaulding Lumber Company quoted in the dissenting opinion at R. 462).

3. The opinion is in conflict with the decision of the Oregon Supreme Court in the Norwood case, which decision should have been controlling, because it was

in harmony with a decision of this Court in the construction of the identical section of said Water Code involved here. (Section 70, *supra*).

4. The opinion is in conflict with the decisions of this Court construing the 14th Amendment to the Federal Constitution in these particulars, namely:

(a) The construction under the "Due process of Law" clause. And

(b) The construction under the Equal Protection of the Law clause.

The opinion holds that petitioner's vested rights were destroyed by said Water Code, enacted after such rights had vested. (R. 450). And the opinion follows an Oregon case (Re Water Rights of Hood River), which construes said Section 70 of said Water Code as destroying all riparian rights that had not, prior to its enactment, been put to beneficial use, but preserves those that had been put to beneficial use. Petitioner's vested riparian right, not having been put to a beneficial use prior to said enactment, petitioner is denied the equal protection of the laws, in that all whose rights had been so beneficially used, are protected to the extent of their use, and the subsequent development of such use.

5. The writ should be allowed because petitioner and others similarly situated acquired their riparian rights on Oregon streams at times when under the decision of this Court, and the decisions of the Oregon

court, such rights became vested property rights on the issuance of the patent to the riparian lands. The Water Code enacted subsequent to the issuance of such patents, could not destroy said rights.

6. The writ should be allowed because petitioner's lands were patented after the enactment of the Desert Land Act, and the Oregon Supreme Court in Hough v. Porter, decided in 1909, prior to the enactment of the Water Code of that year, construed said federal statute as destroying riparian rights in lands patented subsequent to March 3rd, 1877, the date of said Federal Act. Hence the opinion here should have definitely determined such construction to be erroneous. But at page (R. 429) of the opinion it is stated:

That the Court will pass upon that matter *if* the Hood River case, and said Water Code can withstand petitioner's attacks on constitutional grounds. Although it, subsequently, in the opinion questioned the soundness of the Hough v. Porter construction of the Act.

The dissenting opinion is opened with the statement that Mr. Justice Wilbur concurs in the portion which construes said Desert Land Act.

7. The writ should issue because of the conflicting decisions of the Oregon Supreme Court rendered since petitioner acquired its said riparian rights, and which decisions are so confusing and conflicting as to make it in the interest of harmony in the law for this Court

to pass upon said Section 70 of said Water Code. Said Oregon Supreme Court decisions made subsequent to petitioner's acquiring said land, construe said Section 70 of said Water Code *both to have* and *not to have destroyed vested riparian rights not put to beneficial use before the enactment of the Water Code.*

8. The writ should issue because the opinion herein erroneously holds that the Oregon Legislature in the 1909 Act exercised the police power of the State, in the passage of Section 70 of said Water Code, as so construed in said Hood River case.

The effect of the emergency clause, as construed in the opinion herein (R. 444) is, we think, erroneous. Such an emergency clause is not a declaration of police power, but is provided by referendum amendment to the Oregon Constitution to prevent legislative acts, to which the clause is attached, from being referred to the people for a vote. This being the construction of the Oregon Supreme Court, it should have been followed herein.

9. This writ should issue because the decision of the Appellate Court should have held that on its admission, Oregon adopted the common law doctrine of riparian rights then in force, and that the same were in force at the time of the passage of the 1909 Water Code, and such rights acquired prior to that enactment could not be changed thereby.

WHEREFORE PETITIONER PRAYS, that a writ of certiorari issue under the seal of this Court to the United

States Circuit Court of Appeals for the Ninth Circuit commanding said court to certify, and to send to this Court, a full and complete transcript of the record and proceedings in said Appellate Court in this case, cause numbered there 6874, entitled "The California Oregon Power Company, a corporation, Appellant, v. Beaver Portland Cement Company and City of Gold Hill, Oregon, a municipal corporation, Appellees," to the end that the cause may be fully reviewed and all matters and issues therein, determined here. That upon a hearing, the judgment of said Circuit Court of Appeals be reversed, and decree be entered reversing the decree and judgment of the District Court of the United States for the District of Oregon, from which said appeal was taken; and enjoining defendants, and the successors of each, from further destruction of the bed of the stream, Rogue River, where the same described in the Bill of Complaint herein, and restraining them and each of them from removing the rock in the bed of the said river, shattered and broken by the explosions and dynamiting thereof, alleged in the Bill of Complaint herein, and from thereby diverting or changing the channel of said Rogue River, where it flows between the lands of the respective parties hereto; decreeing the petitioner's riparian rights to be common law riparian rights, which attached to petitioner's said lands at the issuance of the patent therefor, and determining that Chapter 216

of the Oregon Laws of 1909 did not deprive the petitioner of its said common law rights in its said lands; and decreeing that such rights were unaffected by the passage of the Desert Land Act of March 3rd, 1877; decreeing that petitioner's said riparian rights are unaffected by the decision of the Supreme Court of Oregon, entitled "In Re The Water Rights of Hood River," reported at 114 Oregon, 112 et seq.

And that the petitioner have a decree for such other and further relief as is usual in such cases.

Respectfully submitted,

Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I, A. E. REAMES, as attorney for the petitioner herein, hereby certify that in my opinion the foregoing petition is well founded, and further certify that the same is not interposed for delay.

A. E. REAMES,
Counsel for Petitioner.

STATE OF OREGON,
COUNTY OF JACKSON. } ss.

I, E. L. LENOX, being first duly sworn, depose and say:

That I am Secretary of the petitioner; that the foregoing petition is true as I verily believe.

E. L. LENOX,

Subscribed and sworn to before me this 22nd day of December, 1934.

W. J. LOOKER,
Notary Public for Oregon.
(My commission expires June 20th, 1938)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(a) Original jurisdiction of this cause by the District Court of the United States for the District of Oregon was obtained under Sec. 41 (1) (Judicial Code, Section 24, amended), Title 28, U. S. C. A., providing that such district court shall have original jurisdiction of civil suits at common law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and (b) is between citizens of different states.

(b) The date of the decree of the district court is March 11, 1932. (R. 79); (Decree of district court, R. 78-79).

(c) Opinion of appellate court was rendered and filed November 5, 1934—set forth in transcript page R. 411-451; Dissenting opinion in transcript of record, pages 452-478, filed November 5, 1934. Both opinions are reported in Federal Reporter, (Second Series), page ——.

(d) Date of the entry of the decree in the appellate court, November 5, 1934. (R. 479-480).

JURISDICTION

The statute under which jurisdiction of this court is invoked is Section 240, Judicial Code, (Title 28, U. S. C. A., Section 347).

STATEMENT OF FACTS

The facts material here are set forth in the summary

and statement of matter involved, at page 1, subdivision 1, of the petition for writ of certiorari, reference being hereby made to the same, and the same being made a part hereof.

Briefly, the petitioner acquired its lands involved in this controversy by purchase from the patentee thereof, March 11, 1921.

The lands of both petitioner and respondents are riparian to the Rogue River, a natural, non-navigable, meandered stream, flowing southerly over and between said lands of the respective parties.

Petitioner's lands were patented April 20, 1885, by patent set forth at R. 301-303. The petitioner is a public service corporation, manufacturing and supplying electrical current, as a public utility, to consumers in the vicinity of the scene of this controversy. It acquired its said lands because they are near the place of distribution of its electrical current. It acquired said lands and held the same for the construction thereon of a stand-by electric plant for the manufacture of current close to the place of distribution, to supply service in case of breakdowns in long transmission lines.

July 21st, 1930, respondent Cement Company, not having access to build its appropriation works on plaintiff's land, exploded dynamite in the river bed for the purpose of thereby making a channel which would draw the water from petitioner's lands. Petitioner obtained a restraining order in the District Court re-

straining further blasting and the removal of the blasted rock.

Petitioner claims its rights as a riparian proprietor owning common law riparian rights.

Petitioner maintains that on its admission, Oregon adopted the common law, and with it the common law riparian doctrine; that said lands bordering upon Rogue River carry with them the common law riparian rights in said stream; that said rights attached to said lands and passed to the patentee thereof upon the issuance of the patent therefor on April 20th, 1885. And that when said lands passed by mesne conveyances to petitioner, petitioner acquired said riparian rights which had vested at the issuance of the patent; that they were part and parcel of the land and could not be lost by nonuser.

Respondents are also riparian owners on the stream, but their claim here is under uncompleted water permits issued by the State Engineer.

They claim petitioner's riparian rights were destroyed by Section 70 of said Water Code, because they were not used prior to enactment of the Code, as it was construed by the Oregon Supreme Court in the Hood River case in 1924, after petitioner's purchase of the lands.

They also claim under the Oregon case of Hough v. Porter, (1909), that lands patented after the date of the Desert Land Act, March 3rd, 1877, carried no

riparian rights, said Federal Act being held to have abolished the same.

The decision of the Appellate Court adopted the decision in said Hood River case, and held that petitioner's said riparian rights were lost by the enactment of Section 70 of said Water Code. It also held that the Oregon Legislature through the emergency clause attached to said Chapter 216, Laws of 1909, declared that said Act was the exercise of the police power of the state, justifying regulation of the use of petitioner's riparian rights. But as so construed, both the Desert Land Act and said Water Code, at the respective dates of their enactment, cut off absolutely the riparian rights in petitioner's lands. This, petitioner denies.

II.

SPECIFICATION OF ERRORS

Petitioner specifies the following errors in the decision of the Appellate Court, and upon which it relies:

1. The decision violates Section 4 of Article XI of the Oregon Constitution, as construed by the Oregon Supreme Court, June 15th, 1920, which decision should have been followed.

2. The decision violates the "Due Process of Law" clause, of the 14th Amendment to the Federal Constitution, in the taking of private property without due process of law.

3. It violates the "Equal Protection of the Laws" clause of the 14th Amendment in this:

It *especially preserves* rights of riparian owners who had used their rights for beneficial purposes before the enactment of the Water Code of 1909, *but denies this same privilege to all who* had *not* so used theirs, and in which class petitioner is.

4. The Appellate Court erred in not construing the Federal Act of March 3rd, 1877, known as the "Desert Land Act," because the Oregon Court had construed it as destroying riparian rights in lands patented after its enactment. Petitioner is entitled to have that question passed upon by the Federal Court.

5. The Appellate Court erred in not reversing the judgment of the District Court, and decreeing an injunction protecting the channel of Rogue River from further blasting or removal of rock already blasted therein.

6. And in failing to decree that petitioner's riparian rights were unaffected by the Desert Land Act, or by Chapter 216 of the laws of 1909.

7. It erred in holding that *Section 70* of the Oregon Water Code of 1909 was an exercise of the police power, *regulating* petitioners' riparian rights, whereas, as construed it took and confiscated the same. The Court erred in not construing said *Section 70* of the Water Code in accordance with the decision of this Court,

directly construing the same as not impairing vested rights.

III.

JURISDICTION

To support the jurisdiction of this Court in determining all of the issues in this case, and considering that the original jurisdiction of the District Court was obtained upon the ground of diverse citizenship, under Judicial Code § 24, as amended, (Title 28, Sec. 41 (1), (b), U. S. C. A.) petitioner cites:

> *City and County of Denver v. N. Y. Trust Company*, 229 U. S. 123, 133, 136; 57 Law ed. 1101, 1120, 1121,

holding as follows:

That the Appellate Court maintained its jurisdiction upon the ground of diverse citizenship, and *its decision was final*, and *its decree determined the entire cause. No appeal under Section 128 of the Judicial Code (cited in Petition) can be had from said decree.*

Petitioner also cites:

> *Harriman v. Northern Securities Co.*, 197 U. S. 244, 287, 49 Law ed. 739, 760,

and the cases there cited at 197 U. S. 287, to the effect that the entire cause may be disposed of herein, the Court of Appeals having finally disposed of said cause in its decree.

Also

> *Missouri Pacific v. State of Nebraska*, 164 U. S. 403, 41 Law ed. 489.

Also

Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379,

cited in the dissenting opinion (R. 467-8).

Buchanan v. Warley, 245 U. S. 60-82; 38 Sup. Ct. 16; 62 Law ed. 149.

This case holds that the 14th Amendment protects both the property right and the said attributes of property and prevents discrimination.

Penn. Coal Company v. Mahon, 260 U. S. 393-422, 67 Law ed. 322.

Lochner v. New York, 198 U. S. 45-76, 49 Law ed. 937.

Coppage v. Kansas, 236 U. S. 1-42, 59 Law ed. 441.

ARGUMENT

Summary.

On its admission, Oregon adopted the common law,—with it the common law riparian doctrine. Its Supreme Court so adjudicated until after petitioner acquired its lands, March 21, 1921, to wit: until 1924, when it decided the Hood River case. That decision construed Section 70 of the Water Code of 1909 as destroying riparian rights that had not been used before its enactment. The code preserved such rights as had been so used. Under all earlier decisions of the State Court, such riparian rights were preserved, regardless of use.

The decision below conflicts with the decision of this court in Pacific Live Stock Co. v. Lewis expressly

construing said *Section 70* as preserving *such vested rights.* (Cited below).

The decision violates *Section 4 of Article XI of the Oregon Constitution* as construed by the state court in Logan v. Spaulding Logging Company, June 15th, 1920, before petitioner acquired its lands. It held that *any impairment* of a riparian right, or of use thereof, violated said constitutional provision. The decision should have been followed by the appellate court.

Police Power.

Respondent cement company was dynamiting and destroying the river channel when enjoined at the institution of this suit. Under the Oregon decisions cited, this is a proper remedy. The court can require such riparian channel to be restored. (Cases cited).

The majority opinion herein holds that the water code of 1909 (Section 70) did not so modify petitioner's riparian rights as to destroy same, but only *regulated* the same, by the exercise of its police power. This is to construe the exercise of a police power as a *taking*, rather than as a *regulation.*

THE COMMON LAW RIPARIAN DOCTRINE

A State, when admitted, may determine for itself whether it will adopt doctrine of riparian rights or doctrine of appropriation.

This court, in

Kansas v. Colorado, 206 U. S., pages 46-118, 27 Sup. Ct. 655, 51 L. ed. 956

so determined. Full quotation at Appendix pages XL-XLI.

On its admission, Oregon adopted Common Law.

This court so decided in

Shively v. Bowlby, 152 U. S. 1, 58; 38 L. ed. 331, 350.

Quotation therefrom, appendix, page XLII.

The Oregon Supreme Court so held in

United States F. & G. Co. v. Bramwell, 108 Or. pages 261-289; July 10, 1923 (217 Pac. 332)

quoted at appendix page XLII.

Here is cited Section 2, Article 1 of the organic law of provisional government of 1845, and section 7, article XVIII of the Constitution of 1857. We believe this Court will accept the decision of the Oregon Court upon this matter without further quotation.

Oregon Courts Bound by the Applicable Rules of the Common Law unless Modified or Abrogated by Statute.

To this effect is:

Fidelity, etc., Co. v. State Bank of Portland, 117 Or. 1, 5. January 19, 1926; 242 Pac. 823

quoted at appendix page XLIII.

This Court has Announced that the Common Law Doctrine of Riparian Rights Prevails in Oregon.

This is the decision in

U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 702; 19 Sup. Ct. 770, at 43 L. ed. 1141,

from which we quote at appendix, page XLIII.

It is there stated that it is the unquestionable rule of the common law that every riparian owner is en-

titled to the natural flow of the stream, etc.; that every proprietor of lands on a stream bank has naturally an equal right to the use of the water which flows in the adjacent stream; that no proprietor has a right to use the water to the prejudice of the other proprietor above or below him; that he has no property in the water, but a usufruct while it passes along; though he has the use, he cannot unreasonably detain it or give it another direction.

This Court has decided, in 1890, that such riparian rights attached to the soil on settlement.

We refer to

Sturr, appellant v. Beck, 133 U. S. 541-552, 33 L. Ed. 761. (Decided Mar. 3, 1890)

from which we make quotation in the appendix at page XLIV.

The Oregon Supreme Court followed STURR v. BECK immediately following the announcement of that decision.

We quote from

Faull v. Cooke, 19 Or. 455-467, 26 Pac. 662; (decided July 1, 1890)

at appendix page XLVI.

It is there held that the homestead claimant's riparian right attached at the date of settlement, provided be obtained patent, "*and cut off the right to divert a stream of water running through such homestead.*"

In 1901 the Oregon Supreme Court followed FAULL v. COOKE, and the Larsen Case cited in Faull v. Cooke, in

Baker v. Brown, 39 Or. 66-75; 65 Pac. 799; 66 Pac. 193 (Decided July 15, 1901)

We quote from it at appendix page XLVII, in substance as follows:

The right of a prior appropriation is limited to the use made before any adverse claims of riparian proprietors attach to the stream.

The Oregon Supreme Court, between 1899 and 1912, decided numerous cases to the effect that the riparian right can only be destroyed through an adverse appropriation for the prescription period of ten years.

Some of them are listed at appendix pages XLVII-XLVIII.

The Oregon Supreme Court in 1886 in a case involving riparian use of water for making power held that it was a well settled law that where a stream is meandered in public surveys, the stream and not the meander line, is the true boundary of the riparian owner; that such owner is entiled to have the natural flow of the water in its accustomed channel and maintained at its heighth. Its right cannot be taken away except by grant or prescription. It defined further the true riparian doctrine. It is

Weiss v. Oregon Iron & Steel Co., 13 Or., 496 (11 Pac. 255).

In 1928, four years after the decision in Re the Water Rights of Hood River, the Oregon Supreme Court cited and quoted the Weiss case with approval, holding that the riparian's right is inseparably annexed to the soil and exists jure naturae as parcel of the land "which right will not be suspended or destroyed by mere nonuser." The case is

Harris v. Southeastern Lumber Company, 123 Or. 549-556 and 557, (262 Pac. 243) *(1928)*

LEGISLATIVE RECOGNITION OF THE COMMON LAW RIPARIAN DOCTRINE

The Oregon Legislature frequently recognized this doctrine by "allowing the condemnation of rights of riparian proprietors *arising from their location.*"

In the Appendix LIV to LIX quotations are made from the titles and the body of the Acts sufficient to support the statement. The Acts are for the years 1891, 1895, 1899, 1903, 1901 and 1905.

THE DECISION OF THE APPELLATE COURT HEREIN VIOLATES SECTION 4 OF ARTICLE XI OF THE OREGON CONSTITUTION, THE "DUE PROCESS OF LAW" CLAUSE, AND THE "EQUAL PROTECTION OF THE LAWS" CLAUSE OF THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION, AND CONFLICTS DIRECTLY WITH A DECISION OF THIS COURT.

1. In

Logan v. Spaulding Logging Co., 100 Or. 731, 736, (190 Pac. 349),

quoted in the dissenting opinion (R. 462), decided *June 15th, 1920*, the Supreme Court of Oregon held an Act of the Oregon Legislature impairing vested riparian rights as violative of said Section 4, Article XI of the Oregon Constitution, which reads:

"**§ 4 Compensation for Property Taken by Corporation.** No per-

> son's property shall be taken by any corporation, under authority of law, without compensation being first made or secured in such manner as may be prescribed by law."

asserting that

> "interference with the natural flow of the stream, in so far as it injures the riparian proprietor, or interferes with his enjoyment of his right to the use of the stream, is a taking *pro tanto* of his property, which is governed by the constitutional provision above quoted."

The opinion in the instant case should, in our belief, have followed this construction of the Oregon constitutional provision.

2. The decision violates the "Due Process" clause of the 14th Amendment in that it takes this private property for a public use without compensation.

Missouri Pacific v. State of Nebraska, supra.

3. It violates the "Equal Protection of the Laws" clause of the 14th Amendment in that it discriminates in the taking of the vested right of the riparian, who had not at the enactment of the Water Code used his right, and protects such a right held by one who did use his, prior to the enactment of the Code, and gives to such other, or to anyone else, the right to take the waters, the use of which has been thus destroyed. As so construed it is unconstitutional under the authority of this Court in

Buchanan v. Warley, supra, and other cases cited.

4. It violates the decision of this Court which con-

strued the identical Section 70 of the 1909 Water Code, in this:

The majority opinion at R. 450 holds:

> "We conclude then, that the riparian owner's right to the natural flow of the stream substantially undiminished has been validly abrogated by the Water Code of 1909 as construed by the Oregon court. Plaintiff's assertion of such a right in this case cannot, therefore, be sustained."

That was based upon the doctrine in the Hood River case, expressed at 114 Ore., page 181, in which it is said:

> "It was within the province of the Legislature by the act of 1909, *to define a vested right* of a riparian owner, or to establish a rule as to when and under what condition, and to what extent a vested right should be deemed to be created in a riparian proprietor."

It followed at page 182 by abolishing the right of the Power Company, by stating:

> "Under our present statute (meaning Section 70 of the 1909 Water Code) defining what shall constitute a vested right of a riparian proprietor, the claim of the Pacific Power and Light Company as a riparian owner of land on Hood River to a continuous flow of the specified quantity of water over its land cannot be maintained."

In

Pacific Livestock Company v. Lewis, 241 U. S. at page 445, 60 Law Ed. at page 1095,

this Court, referring to *Section 1 and Section 70* of said 1909 Water Code, said:

> "That the statute is not intended to take away or impair any vested right to any water or to its use is expressly declared in its 1st and 70th sec-

tions, 3 Lord's Oregon Laws, §§ 6594, 6595." (47-403, 47-404 Or. Laws 1930),

In that case this Court considered

Re Willow Creek. 74 Or. 592, 631, 617, (144 Pac. 505),

in which opinion the Oregon Supreme Court in that *water adjudication under that Water Code* said:

> "The doctrine of prior appropriation and riparian rights is not so antagonistic that they may not exist in the same locality.' (From 74 Or. 626). * * * * And that when such riparian rights "have become vested, they cannot be taken away by legislative enactment nor judicial decree. Like all property they are subject to reasonable regulation." (From the Oregon Report, page 627). Appx. L.

Yates v. Milwaukee, 77 U. S. (10 Wall.) 497-507 defined such a riparian right as such valuable property and we take this quotation from 19 Law Ed., page 986:

> "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. *It is a right of which, when once vested, the owner can only be deprived in accordance with established law*, and if necessary that it be taken for the public good, upon due compensation."

THE RIVER BED

By the terms of the Federal Act of May 18, 1796, and still in force, it is provided that in all cases, like this one, where the *opposite banks of a non-navigable stream belong to different persons, both the stream and the bed of the stream become common to both.*

We construe this to mean that they are common

owners in the right to use both the stream and the stream bed. Here, the respective owners actually own to the thread of the stream. This thread is the boundary of the respective parties, separting their lands. But together they have the right to use both the stream and the stream bed, as provided by the Federal Statute. The bed is the way, or course, for the stream. The right of use is, under the statute, joint, as between the owners of the opposite banks of the stream. We cite the statute:

Section 9 of Chapter 29 of the Act of May 18, *1796*, being Revised Statutes, Section 2476, as printed in Volume 2 of the United States Compiled Statutes of 1901, reads:

> "Sec. 2476. Navigable rivers within public lands to be public highways.
>
> All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the *stream and the bed* thereof shall become common to both.
>
> Act May 18, 1796, c. 29, Sec. 9, 1 Stat. 468. Act March 3, 1803, c. 27, Sec. 17, 2 Stat. 235."

THE REMEDY INJUNCTIVE RELIEF

The remedy herein is an injunction to restrain further blasting or removal of rock from the blasted area; destroying the river banks or river channel, etc.

> *Mace v. Mace*, 40 Or. 586, (67 Pac. 660; 68 Pac. 737),

holding that equity will compel restoration of the

stream to its natural position and to permit it to so remain.

It cites:

Cox v. Bernard, 39 Or. 53, (64 Pac. 860).

The opinion in Weiss v. Oregon Iron Works, (1886), supra, determines that injunction is proper to restrain diversions from the channel.

RESPONDENT'S PERMITS

Respondents' permits for the use of water were issued Ex parte by the State Engineer.

Tobey v. Bridgewood, 127 Pac. 178-185 (Supreme Court of Idaho. Oct. 3, 1912).

Washington State Sugar Co. v. Goodrich, 147 Pac. 1073, 1076. (Supreme Court of Idaho. April 28, 1915).

Basinger v. Taylor, 164 Pac. 522-528. (Supreme Court of Idaho. April 3, 1917).

Marshall v. Niagara Springs Orchard Co., 125 Pac. Rep. 208-213. (Supreme Court of Idaho. June 8, 1912).

It was held in

Wyoming v. Colorado, 259 U. S., pages 419-496; 42 Sup. Ct. 552; 66 Law Ed. 999, 1023.

that such permits issued under a similar statute of Wyoming were not, in law, adjudications; are mere licenses to appropriate, and as to many, nothing ever is done. In such cases there are no appropriations.

POLICE POWER

The majority opinion herein (R. 444), sets forth the Emergency Clause attached to the 1909 Water Code,

as the same is printed at Appendix XXXIII. It is Section 74. The Court first states:

> "The Oregon Code of 1909 itself purported to be an exercise of the police power of the State as shown by Section 74."

The Supreme Court of Oregon in

Kadderly v. Portland, 44 Or. 118, (Dec. 1903), (74 Pac. 710, 75 Pac. 222).

construed the Referendum Amendment of the Oregon Constitution, from which this emergency clause is taken. That Amendment, so far as pertains to this matter is copied at Appendix XXXIV-XXXV.

The Kadderly case holds that the purpose of that emergency clause is to prevent legislative acts from being referred to a vote of the people; the language of the Amendment is broader and includes *all laws of whatever kind* necessary for the immediate preservation, etc., *whether they impose restraints on persons and property, or come strictly within the police power;* that it is the duty of the courts to determine whether it conflicts with the fundamental law. Quoted, App. XXXV.

See

Cameron v. Stevens, 121 Or. 538, (1927) (256 Pac. Rep. 395) (Appx. XXXVIII).

Colorado, Arizona and Ohio took their similar referendum Amendments from Oregon, and followed the Kadderly case. (Appendix XXXIX-XL).

In Pacific Livestock v. Lewis, supra, this Court

quoted from the Willow Creek, supra, as having said:

> "The state enacted the law of 1909 thereby to a *limited extent* calling into requisition its police power." (From 241 U. S. 449, 60 Law Ed. 1097).

Mr. Justice Henry Bean, wrote the opinions in both the Willow Creek and Hood River cases. We believe that this Court did not consider Section 70 of the Water Code, the exercise of a police power, or as taking any vested rights.

What Constitutes Exercise of Police Power in regulation.

This court, in

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393-422; 67 L. ed. 322

and following, at page 416 of the U. S. report said:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."

In

Lochner v. New York, (supra)

this court said, in effect, that the court cannot shut its eyes to the fact that many laws that are not the exercise of police power are camouflaged as such, and for that reason the Court should consider the character of the law.

The Supreme Court of Oregon, in the Willow Creek case, supra, stated that both the doctrine of riparian proprietorship and of appropriation could exist in the same community, and it did, in that case, adjudicate both classes of rights.

Petitioner has a riparian use for generating power, always recognized in the common law.

See

Buchanan v. Warley, supra.

In

Coppage v. Kansas, supra,

this court held, in effect, that when a party appeals to this court for the protection of rights secured by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced in the state.

The Desert Land Act.

The four sections of the act which might be material here are fully set forth in the appendix at pages XLVIII-L. The fifth section has no relation to matters here treated.

We feel that the appellate court really determined that the Hough v. Porter construction of the act cannot be accepted. The senior judge, Mr. Justice Wilbur, began his dissenting opinion with his concurrence in this determination. Our fault with the main opinion is that it avoids directly deciding the question.

Petitioner is entitled to have the Federal Court construe federal statutes.

Ex Parte Tyler, 149 U. S. 164-192, 13 Sup. Ct. 785, 37 Law Ed. 689, 697. (April 24, 1893).

This question is really of great public concern, and

as the opinion shows, has been construed differently in the supreme courts of several states.

CONCLUSION AND PRAYER

It is, therefore, respectfully submitted that this is a case calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari herein, and thereafter reviewing and reversing the decision of the Appellate Court; that petitioner have a decree as prayed for in its Bill of Complaint, and granting such other and further relief as shall be mete in equity.

A. L. REEVES,

Counsel for Petitioner.

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APPENDIX

GENERAL LAWS OF OREGON
1 9 0 9
WATER CODE
Chapter 216.

AN ACT

Providing a system for the regulation, control, distribution, use, and right to the use of water, and for the determination of existing rights thereto within the State of Oregon, providing penalties for its violation and appropriating money for the maintenance thereof, and declaring an emergency.

Be It Enacted by the Legislative Assembly of the State of Oregon:

Be It Enacted by the People of the State of Oregon:

Section 1. Subject to existing rights, all waters within the State may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, or corporation, or association, to any water.

Section 2. Water Divisions.—The State of Oregon is hereby divided into two water divisions, as follows:

Water Division No. 1 shall consisit of all the lands embraced within the following counties, to-wit: Benton, Clackamas, Columbia, Clatsop, Coos, Curry, Douglas, Josephine, Jackson, Klamath, Lake, Lane, Linn, Lincoln, Marion, Polk, Multnomah, Tillamook, Yamhill and Washington.

Water Division No. 2 shall consist of all the lands embraced within the remaining counties of the State.

Section 3. Division Superintendents, Appointments and Term of.—There shall be one superintendent for each water division, who shall, immediately after this act becomes effective, be appointed by the governor to serve until January 1, 1911, or until his successor is appointed or elected and shall have qualified, and who shall be a resident of the water division for which he is appointed. At the general election in 1910, and every

four years thereafter, there shall be elected by the voters of the counties of the first and second water divisions of the State a division superintendent, each of whom shall hold office for the term of four years, or until his successor is elected and qualified. Each of said water superintendents shall have knowledge and experience relative to the irrigation law and its administration, and measurement of flowing water, evaporation, seepage, and common alkalies, drainage and hydrographic features of the water division in which the candidate may reside.

Section 4. Duties.—Said division superintendent shall have general control over the water masters of the several districts within his division. He shall execute the laws relative to the distribution of water, and perform such other functions as may be assigned to him. He shall have authority to make such reasonable regulations to secure the equal and fair distribution of water in accordance with the determined rights as may be needed in his division. Such regulations shall not be inconsistent with the laws of the State.

Section 5. Appeal From.—Any person, association, or corporation who may deem himself, or, itself aggrieved by any such order or regulation of such division superintendent shall have the right to appeal from the same to the Board of Control by filing with it a copy of the order or regulation complained of and a statement of the manner in which the same injuriously affects the petitioner's interest. The board shall, after due notice, hear whatever testimony may be adduced by the petitioner, either orally or by affidavit, and shall have the power to suspend, amend or confirm the order complained of.

Section 6. Water Division Superintendent and Compensation Of.—Each division superintendent shall receive a salary of two thousand four hundred dollars per annum, in full compensation for all his services, and shall in addition thereto be paid his actual traveling expenses when called away from home in the performance of his duties. Such salary and expenses

shall be paid at the same time and in the same manner as those of other State officers. Such division superintendents shall not engage in any other business.

Section 7. Oath and Bond.—Before entering upon the duties of his office, each division superintendent shall take and subscribe an oath faithfully to perform the duties of his office, and file with the Secretary of State said oath and his official bond in the penal sum of five thousand dollars, with surety, or sureties, to be approved by the Governor, and conditioned for the faithful discharge of the duties of his office.

Section 8. State Engineer.—As soon as possible after this act shall become effective a State Engineer, technically qualified and experienced as an hydraulic engineer, shall be appointed by the Governor. He shall hold his office until January 1, 1911, unless sooner removed by the Governor for cause, and until his successor shall have been elected and shall have qualified. At the general election held in November, 1910, and every four years thereafter, there shall be elected a State Engineer by the voters of the State, whose term of office shall be four years, and until his successor is elected and qualified. He shall receive a salary of $2400.00 per annum and actual necessary traveling expenses while away from his office in the discharge of official duties, payable as other State officers are paid. He shall perform such duties as are prescribed by law, and may employ assistants and purchase materials and supplies necessary for the proper conduct and maintenance of his department in pursuance of appropriations as made from time to time for such purposes.

Section 9. Board of Control.—The State Engineer and the superintendents of the two water divisions shall constitute a Board of Control, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State, and of their appropriation, distribution, and diversion, and of the various officers connected therewith. The decisions of said board shall be subject to appeal to the circuit and

supreme courts, which appeal shall be governed by the practice in suits in equity, unless otherwise provided herein. Said board shall have an office in the Capitol at Salem, and shall hold two regular meetings each year for the transaction of such business as may come before it, the first of said meetings to begin on the second Wednesday in April and the second on the third Wednesday in November. The State Engineer shall be ex-officio president of said board, and shall have a right to vote on all questions coming before it. A majority of said board shall constitute a quorum to transact business. The board shall have power to adjourn meetings from time to time, and to meet in special session at the call of the president, or of any two members. Notice of any special meeting must be given by registered mail to each member three days before the date thereof, but such meeting may be held at any time when all members of the board are present.

Section 10. Secretary and Other Assistants; Salary. —The Board of Control shall have authority, with power of removal, to appoint a secretary, who shall receive a salary of twelve hundred dollars per annum. He may be required by the board to furnish such bond as it may deem necessary, for the faithful performance of his duties. The duties of the secretary shall consist in keeping a full, true, and complete record of the transactions of the Board of Control, and he shall certify, under seal, all water right certificates made according to law. He shall perform such other duties as may be imposed by law or required of him by the board. Said board shall also have the power to employ such other assistants and purchase materials and supplies as may be necessary for the proper conduct of its business.

Section 11. Determination.—Upon a petition to the Board of Control, signed by one or more water users upon any stream, requesting the determination of the relative rights of the various claimants to the waters of that stream, it shall be the duty of the Board of Control, if, upon investigation, they find the facts and conditions are such as to justify, to make a determin-

ation of the said rights, fixing a time for beginning the taking of testimony and the making of such examination as will enable them to determine the rights of the various claimants. In case suit is brought in the circuit court for the determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the Board of Control for determination as in this act provided.

Section 12. Notice of Proceedings.—The board shall prepare a notice, setting forth the date when the engineer will begin an investigation of the flow of the stream and of the ditches diverting water therefrom, and a place and a time certain when the superintendent of the water division in which that stream is situated, shall begin the taking of testimony as to the rights of the parties claiming water therefrom. Said notice shall be published in two issues of one or more newspapers having general circulation in the counties in which such stream is situated, the last publication of said notice to be at least thirty days prior to the beginning of taking testimony by said division superintendent, or for the measurement of the stream by the State Engineer, or his assistant. The superintendent taking such testimony shall have the power to adjourn the taking of testimony from time to time and from place to place to suit the convenience of those interested.

Section 13. Notice to Claimants.—It shall be the duty of said division superintendent to send by registered mail to each person, firm or corporation, hereinafter to be designated as claimant, claiming the right to the use of any of the waters of said stream, and to each person, firm or corporation owning or being in possession of lands bordering on and having access to said stream or its tributaries, insofar as such claimants and owners and persons in possession can reasonably be ascertained, a similar notice setting forth the date when the State Engineer or his assistant will begin the examination of the stream and the ditches diverting the waters therefrom, and also the date when the superintendent will take testimony as

to the rights to the water of said stream. Said notice must be mailed at least thirty (30) days prior to the date set therein for making the examination of the stream or the taking of testimony.

Section 14. Statement of Claimant.—The division superintendent shall, in addition, inclose with said notice a blank form on which said claimant or owner shall present in writing all the particulars necessary for the determination of his right to the waters of the stream to which he lays claim, the said statement to include the following:

The name and postoffice address of the claimant.

The nature of the right or use on which the claim is based.

The time of initiation of such right or the commencement of such use, and if distributing works are required.

The date of beginning of construction.

The date when completed.

The date of beginning and completion of enlargements.

The dimensions of the ditch as originally constructed and as enlarged.

The date when water was first used for irrigation or other beneficial purposes, and if used for irrigation, the amount of land reclaimed the first year, the amount in subsequent years, with the dates of reclamation, and the amount and general location of the land such ditch is intended to irrigate.

The character of the soil and the kind of crops cultivated, and such other facts as will show a compliance with the law in acquiring the right.

Section 15. Statement To Be Under Oath.—Each claimant or owner shall be required to certify to his statements under oath, and the superintendent of the water division in which the testimony is taken is hereby authorized to administer such oaths, which shall be done without charge, as also shall be the furnishing of blank forms for said statement.

Section 16. Testimony Taken by Division Superin-

tendent.—Upon the date named in the notice provided for herein for the taking of testimony, the division superintendent shall begin the taking of such testimony and shall continue until completed. In case the division superintendent of any water division is directly or indirectly interested in the water of any stream of his division, or is prevented by illness or otherwise from the taking of such proofs, the taking of testimony so far as relates to said stream shall be under the direction of any other member of the Board of Control.

Section 17. Fees.—At the time of the submission of proof of appropriation, or at the time of the taking of testimony for the determination of rights to water, the division superintendent shall collect from each of the claimants or owners a fee of one dollar for the purpose of recording the water right certificate, when issued, in the office of the county clerk, together with the additional fee of fifteen cents for each acre of irrigated lands up to and including 100 acres, and five cents per acre for each acre in excess of 100 acres up to and including 1,000 acres, and one cent for each acre in excess of 1,000; also 25 cents for each theoretical horsepower up to and including 100 horsepower, and fifteen cents for each horsepower in excess of 100 up to and including 1,000 horsepower, and five cents for each horsepower in excess of 1,000 horsepower up to and including 2,000 horsepower, and two cents for each horsepower in excess of 2,000 horsepower, as set forth in such proof, the minimum fee, however, for any claimant or owner in such cases to be $2.50, also a fee of five dollars for any other character of claim to water. All fees collected by the division superintendent shall be accounted for at the following regular meeting of the Board of Control and paid by such board into the general fund of the State Treasury, except, however, those fees due, or to be paid to the county clerk. But in cases of appropriations of water made under a permit issued under the provisions of this act, only one dollar recording fee above provided shall be so collected by the division superintendent.

Section 18. Notice Upon Completion of Testimony.—

Upon the completion of the taking of testimony by the division superintendent, it shall be his duty at once to give notice by registered mail to the various claimants that at a time and place named in the notice not less than ten days thereafter, all of said evidence shall be open to inspection of the various claimants or owners, and said superintendent shall keep said evidence open to inspection at said places not less than ten days, and such other time as fixed in the notice. Said superintendent shall also state in said notice the county in which the determination of the Board of Control will be heard by the circuit court; provided, that said cause shall be heard in the county in which said stream or some part thereof is situate.

Section 19. Contests.—Should any person, corporation or persons owning any irrigation works, or claiming any interest in the stream or streams involved in the determination, desire to contest any of the rights of the persons, corporations or associations, who have submitted their evidence to the superintendent as aforesaid, such persons, corporations or associations, shall within five days after the expiration of the period as fixed in the notice for public inspection, notify the superintendent in writing, stating with reasonable certainty the grounds of their proposed contest, which statement shall be verified by the affidavit of the contestant, his agent or attorney, and the said division superintendent shall notify the said contestant and the person, corporation or association, whose rights are contested, to appear before him at such convenient place as the superintendent shall designate in said notice.

Section 20. Hearing.—Said superintendent shall also fix the time and place for the hearing of said contest, which date shall not be less than thirty nor more than sixty days from the date the notice is served on the party, association or corporation, which notice and returns thereof shall be made in the same manner as summons are served in civil actions in the circuit courts of this state. Superintendents of water divisions shall have power to adjourn hearings from time to

time upon reasonable notice to all the parties interested, and to issue subpoenas and compel the attendance of witnesses to testify upon such hearings, which shall be served in the same manner as subpoenas issued out of the circuit courts of the State, and shall have the power to compel such witnesses so subpoeanaed to testify and give evidence in said matter, and said witnesses shall receive fees as in civil cases, the costs to be taxed in the same manner as are costs in suits in equity. The evidence in such proceedings shall be confined to the subjects enumerated in the notice of contest.

Section 21. Contests; Deposit Required.—The superintendent shall require a deposit of five dollars from each party for each day he shall be so engaged in taking evidence of said contest. Upon the final determination of the matters by the Board of Control, an order shall be entered directing that the money so deposited shall be refunded to the persons, associations or corporations in whose favor such contest shall be determined, and that all moneys deposited by other parties therein shall be turned over by the superintendent to the Board of Control, who shall pay the same into the general fund of the State Treasury upon adjournment of each regular meeting of the board.

Section 22. Evidence Transmitted.—Upon the expiration of the period for which the evidence is kept open for inspection, the evidence in the original hearing before the superintendent, and the evidence taken in all contests, shall be transmitted by the superintendent to the office of the Board of Control in person, or by registered mail. Such evidence shall thereupon be filed with the board.

Section 23. Measurements of Streams and Ditches.—It shall be the duty of the State Engineer, or some qualified assistant, to proceed at the time specified in the notice to the parties on said stream to make an examination of said stream and the works diverting water therefrom, said examination to include the measurement of the discharge of said stream and of

the carrying capacity of the various ditches and canals, and examination of the irrigated lands; and an approximate measurement of the lands irrigated or susceptible of irrigation from the various ditches and canals; and to take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested; which said observation and measurement shall be reduced to writing and made a matter of record in his office, and it shall be the duty of the State Engineer to make or cause to be made a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy the course of said stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or which are susceptible of irrigation from the ditches and canals already constructed.

Section 24. Order Determining Water Rights.—As soon as practicable after the compilation of said data, and the filing of said evidence, it shall be the duty of the Board of Control to make, and cause to be entered of record in its office, an order determining and establishing the several rights to the waters of said stream. As soon as practicable thereafter a certified copy of said determination shall be filed in the office of the county clerk of each county in which said stream, or any part thereof or any tributary, is situated, and the original evidence filed with the Board of Control shall be certified by the clerk of the board and, together with a certified copy of said determination, shall be filed with the clerk of the circuit court by which court such determination is to be heard. The determination of the board shall be in full force and effect from the date of its entry in the records of the board, unless and until its operation shall be stayed by a stay bond as provided for by this act. Upon the filing of the evidence with the circuit court of the county in which the determination is to be had, the board shall procure an order from said circuit court, or any judge thereof, fixing the time at which the determination shall be

heard in said court. Copies of this order, certified by the clerk of said court, shall be filed by the board as soon as practicable in the office of the county clerk of each county in which said determination is filed.

Section 25. Water Right Certificate.—Upon the final determination of the rights to the waters of any stream, it shall be the duty of the secretary of the Board of Control to issue to each person, association or corporation represented in such determination a certificate to be signed by the president of the Board of Control, and attested under seal by the secretary of said board, setting forth the name and postoffice address of the owner of the right; the priority of the date, extent and purpose of such right; and if such water be for irrigation purposes, a description of the legal subdivisions of land to which said water is appurtenant. Such certificate shall be transmitted by the president, or other member of the Board of Control, in person or by registered mail, to the county clerk of the county in which such right is located, and it shall be the duty of the county clerk upon receipt of the recording fee of one dollar collected as hereinbefore provided, to record the same in a book especially prepared and kept for that purpose, and thereupon immediately transmit the certificate to the respective owners.

Section 26. Court Procedure.—From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be as nearly as may be like those in a suit in equity, except that any proceedings, including the entry of a decree, may be had in vacation with the same force and effect as in term time. Within thirty days from the filing of such evidence and order in the circuit court, or within such further time as the court may for good cause allow, any party may file exceptions to the determination. If no exceptions shall be filed, the court shall on the day set for hearing enter a decree affirming the determination of the board.

All parties may be heard by counsel upon the consideration of the exceptions. The court may, if neces-

sary, remand the case for such further evidence to be taken by the superintendent of the water division as it may direct, and may require a further determination by the board. After the hearing, the court shall enter a decree affirming or modifying the order of the Board of Contr Upon the hearing, the court may assess and adjudge against any party such costs as it may deem just. Appeals may be taken to the supreme court from such decrees in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within sixty days from the entry of the decree.

Section 27. Clerk Shall Transmit Transcript to Clerk of Board.—The clerk of the circuit court, immediately upon the entry of any decree by the circuit court or by the judge thereof, shall transmit a certified copy of said decree to the secretary of the Board of Control. The secretary shall immediately enter the same upon the records of such office and the State Engineer shall forthwith issue to the superintendent or superintendents of water divisions instructions in compliance with the said decree, and in execution thereof.

Section 28. Distribution.—During the time the hearing of the order of the Board of Control is pending in the circuit court, and until a certified copy of the judgment, order or decree of the circuit court is transmitted to the Board of Control, the division of water from the stream involved in such appeal shall be made in accordance with the order of the board.

Section 29. Stay Bond.—At any time after the determination of the board has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond in the circuit court wherein such determination is pending in such amount as the judge thereof may prescribe, conditioned that such party will pay all damages that may accrue by reason of such determination not being enforced. Immediately upon the filing and approval of such bond, the clerk of the circuit court shall transmit to the Board of Control

a certified copy of such bond, which shall be recorded in the records by such board, and the State Engineer shall immediately give notice thereof to the superintendent of the proper water division.

Section 30. Rehearing.—Within six months from the date of the decree of the circuit court determining the rights upon any stream, or if appealed within six months from the decision of the supreme court, the Board of Control, or any party interested, may apply to the circuit court for a rehearing upon grounds to be stated in the application. Thereupon, if in the discretion of the court it shall appear that there are good grounds for the rehearing, the circuit court, or judge thereof, shall make an order fixing a time and place when such application shall be heard. The clerk of the circuit court shall, at the expense of the petitioner, forthwith mail written notice of said application to the Board of Control and to every party interested, and state in such notice the time and place when such application will be heard.

Section 31. Authorized to Administer Oaths.—The members of the Board of Control may administer oaths in the performance of their official duties.

Section 32. Fees.—The secretary of the Board of Control shall collect the following fees, which shall be paid in advance, and accounted for to the board, which fees shall be paid into the general fund of the State Treasury by such board at the adjournment of each regular meeting: for making transcripts of the records of the Board of Control or of papers or documents filed with said board, one dollar for the first folio and ten cents for each additional folio. For attaching certificate and seal of the board to each transcript, one dollar.

Section 33. Conclusive, When.—The determinations of the Board of Control as confirmed or modified as provided by this act in proceedings shall be conclusive as to all prior rights, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination.

Section 34. Duty of Water Right Claimants.—Whenever proceedings shall be instituted for the determination of the rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his claim shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him. Any person, association or corporation interested in the water of any stream upon whom or which no service of notice shall have been had of the pendency of proceedings for the determination of the rights to the use of the water of said stream, and who or which shall have no actual knowledge or notice of the pendency of said proceedings may at any time prior to the expiration of one year after the entry of the determination of the board file a petition to intervene in said proceedings. Such petition shall contain, among other things, all matters required by this act, of claimants who have been duly served with notice of said proceedings and also a statement that the intervenor had no actual knowledge or notice of the pendency of said proceeding. Upon the filing of said petition in intervention, the petitioner shall be allowed to intervene upon such terms as may be equitable, and thereafter shall have all rights vouchsafed by this act to claimants who have been duly served.

Section 35. Proof Open to Inspection; Who May Contest.—Whenever the rights to the waters of any stream have been determined as herein provided, and it shall appear by the records of such determination that it had not been at one and the same proceeding, then in such case the Board of Control may open to public inspection, all proofs or evidence of rights to the water, and the findings of the board in relation thereto in the manner provided in Section 18; and any

persons, corporations, or associations who may desire to contest the claims or rights of other persons, corporations, or associations, as set forth in the proofs or established by the board, shall proceed in the manner provided for in Sections 19, 20 and 22; provided, that contests may not be entered into and shall not be maintained except between claimants who were not parties to the same adjudication proceedings in the original hearings.

WATER MASTERS.

Section 36. Districts.—The Board of Control shall divide each water division into water districts, and said water districts to be so constituted as to secure the best protection to the claimants for water and the most economical supervision on the part of the State; said water district shall not be created until a necessity therefor shall arise, but shall be created from time to time as the claims thereof from the streams of the State shall be determined.

Section 37. Water Master; How Appointed.—There shall be appointed by the Board of Control, one water master for each water district, who shall be a resident of the district he is appointed for and who shall have been a resident of said district for one year immediately prior to the date of his appointment, shall be selected from persons recommended by the superintendent of the water division in which such water district is situated. Each water master shall hold his office until his successor is elected and shall have qualified, and the Board of Control shall, by like selection and appointment, fill all vacancies which shall occur in the office of water master.

Section 38. Duty of Water Master.—It shall be the duty of the said water masters to divide the water of the natural streams or other sources of supply of his district among the several ditches and reservoirs, taking water therefrom, according to the rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the headgates of ditches, and shall regulate or cause to be regulated,

the controlling works of reservoirs, in time of scarcity of water, as may be necessary by reason of the rights existing from said streams of his district. The water master shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir, where rights have been determined, in accordance with existing decrees. Whenever, in the pursuance of his duties, the water master regulates a headgate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such headgate or controlling works, a written notice properly dated and signed, setting forth the fact that such headgate or controlling works has been properly regulated and is wholly under his control, and such notice shall be a legal notice to all parties interested in the division and distribution of the water of such ditch or reservoir. It shall be the duty of the district attorney to appear for, or on behalf of the division superintendent or any water master in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of said district attorney.

Section 39. Water Master Shall Prevent Waste.—Said water master shall, as near as may be, divide, regulate and control the use of the water of all streams within his district by such closing or partially closing of the headgates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled, and any person who may be injured by the action of any water master, shall have the right to appeal to the circuit court for an injunction. Such injunction shall only be issued in case it can be shown at the hearing that the water master has failed to carry into effect the order of the board of control or decrees of the court determining the existing rights to the use of water.

Section 40. Pay of.—Each water master herein provided for shall receive compensation at the rate of $5.00 per day for each day he shall be actively employed in the duties of his office. Where the service may be improved by continuous employment and upon recommendation of the division superintendent and the

approval of the county court of the county, or counties, in which said district is located by an order, or orders, made at regular term, or terms, thereof when sitting for the transaction of county business he shall receive pay at the rate of $100.00 per month, in either case to be paid by the county in which the work is performed. Each water master shall keep a true and just account of time spent by him in the duties of each county, respectively, in which his duties may extend, and he shall present a true copy thereof, verified by oath, to the county court sitting for the transaction of county business of the county in which his work may be performed. And the county court shall, upon approval thereof by the superintendent of the water division, allow and pay the same. *Provided*, any water master may be suspended by an order of the county court of any county in which his district may lie in case said court shall find and enter an order to the effect that said water master is claiming more time than the public service requires, and during such suspension such water master shall receive no pay.

Section 41. Employment of Assistants.—Said water master shall have power, in cases of emergency, to employ suitable assistants to aid him in the discharge of his duties. Such assistants shall take the same oath as the water master, and shall obey his instructions, and each shall be entitled to such compensation as his services may demand and as the superintendent may recommend, not to exceed in any case, four dollars per day for each day he is employed, such payments to be made upon certificates of the division superintendent in the same manner as provided for the payment of the water master. The term of service of such assistant water master may be terminated at any time by the division superintendent, and shall in no event continue after the emergency has ceased to exist.

Section 42. Water Masters to Begin Work, When.—When arrangements are not made for employment of a water master at a monthly rate, as provided in Section 40 of this act, the said water master shall begin his work upon written demand being made upon

him therefor by one or more water users. Such written demand for his services shall be attached to his bill for services and forwarded with it to the county commissioners of the proper county. Where the said water master is employed by the month he shall begin work and terminate his services as the superintendent of his water division may direct. The division superintendent may, under any condition, call upon the water master for work within his district whenever the necessity therefor may in his judgment arise.

Section 43. Interference With Headgate; Penalty.—Any person who shall willfully open, close, change or interfere with any lawfully established headgate or water box without authority, or who shall willfully use water or conduct water into or through his ditch which has been lawfully denied him by the water master or other competent authority, shall be deemed guilty of a misdemeanor. The possession or use of water when the same shall have been lawfully denied by the water master or other competent authority shall be *prima facie* evidence of the guilt of the person using it.

Section 44. Power of Arrest.—The water master, or his assistants, within his district shall have power to arrest any person or persons violating any of the provisions of this act and turn them over to the sheriff or other competent police officer within the county; and immediately upon delivering any such person so arrested into the custody of the sheriff, it shall be the duty of the water master making such arrest to immediately, in writing and upon oath, make complaint before the proper justice of the peace against the person so arrested.

PROCEDURE RELATIVE TO THE APPROPRIATION OF WATER.

Section 45. Application.—Any person, association or corporation hereafter intending to acquire the right to the beneficial use of any waters shall, before commencing the construction, enlargement or extension of any ditch, canal or other distributing or controlling works, or performing any work in connection with

said construction, or proposed appropriation, make an application to the State Engineer for a permit to make such appropriation. Any person who shall willfully divert or use water to the detriment of others without compliance with law, shall be deemed guilty of a misdemeanor. The possession or use of water, except when a right of use is acquired in accordance with law, shall be *prima facie* evidence of the guilt of the person using it.

Section 46. Applications, Nature of.—Each application for permit to appropriate water shall set forth the name and postoffice address of the applicant, the source of water supply, the nature and amount of the proposed use, the location and description of the proposed ditch, canal, or other work, the time within which it is proposed to begin construction, the time required for completion of the construction, and the time for the complete application of the water to the proposed use. If for agricultural purposes, it shall give the legal subdivisions of the land and the acreage to be irrigated, as near as may be. If for power purposes, it shall give the nature of the works by means of which the power is to be developed, the head and amount of water to be utilized, and the uses to which the power is to be applied. If for the construction of a reservoir, it shall give the height of dam, the capacity of the reservoir, and the uses to be made of the impounded waters. If for municipal water supply, it shall give the present population to be served, and, as near as may be, the future requirements of the city. If for mining purposes, it shall give the nature of the mines to be served, the methods of supplying and utilizing the water. All applications shall be accompanied by such maps and drawings, in duplicate, and such other data as may hereafter be prescribed by the Board of Control, and such accompanying data shall be considered as a part of the application.

Section 47. Applications, Approval of.—Upon receipt of an application, it shall be the duty of the State Engineer to make an indorsement thereon of the date of its receipt and to keep a record of the same. If upon

examination the application is found to be defective, it shall be returned for correction or completion, and the date of, and reasons for the return thereof, shall be indorsed thereon and made a record in his office. No application shall lose its priority of filing on account of such defects, provided acceptable maps and drawings are filed in the office of the State Engineer within thirty days from the date of said return to the applicant. All applications which shall comply with the provisions of this act shall be recorded in a suitable book kept for that purpose, and it shall be the duty of the State Engineer to approve all applications made in proper form which contemplate the application of water to a beneficial use, but when the proposed use conflicts with determined rights, or is a menace to the safety and welfare of the public, the application shall be referred to the Board of Control for consideration. It shall be the duty of the board to enter an order directing the refusal of such application, if, after full hearing, the public interest demands. An application may be approved for a less amount of water than that applied for, if there exists substantial reasons therefor, and in any event shall not be approved for more water than can be applied to a beneficial use. Applications for municipal water supplies may be approved to the exclusion of all subsequent appropriations, if the exigencies of the case demand upon consideration and order by the Board of Control.

Section 48. Application, How Indorsed.—The approval or rejection of an application shall be indorsed thereon and a record made of such indorsement in the State Engineer's office. The application so indorsed shall be returned immediately to the applicant by mail. If approved, the applicant shall be authorized, on receipt thereof, to proceed with the construction of the necessary works, and to take all steps required to apply the water to a beneficial use, and to perfect the proposed appropriation. If the application is refused, the applicant shall take no steps toward the construction

of the proposed work or the diversion and use of water so long as such refusal shall continue in force.

Section 49. Assignment of Permit.—Any permit or license to appropriate water may be assigned, subject to the conditions of the permit, but no such assignment shall be binding, except upon the parties thereto, unless filed for record in the office of the State Engineer.

Section 50. Limitation on Time of Completing Work. —Actual construction work shall begin within one year from the date of approval of the application and the construction of any proposed irrigation or other work shall thereafter be prosecuted with reasonable diligence, and be completed within a reasonable time, as fixed in the permit, not to exceed five years from the date of such approval. The Board of Control shall, for good cause shown, extend the time within which irrigation or other works shall be completed, or the right perfected, under any permit which may be submitted for its consideration by the State Engineer.

Section 51. Appeals.—Any applicant may appeal to the Board of Control for relief, which board may modify the decisions of the State Engineer if it shall appear that he has abused the authority reposed in him by law. Such appeal shall be taken within 30 days from the date of such decision by the State Engineer, and shall be perfected when the applicant shall have filed in the office of the board a copy of the order appealed from, together with a petition setting forth the appellant's reason for appeal, and such appeal shall be heard and determined upon such competent proof as shall be adduced by the applicant, and such like proofs as shall be adduced by the State Engineer. The State Engineer shall not sit as a member of the board on such appeal.

Section 52. Fees.—The following fees shall be collected by the State Engineer in advance, and be paid by him into the general fund of the State Treasury on the last day of March, June, September and December of each year:

(a) For examining an applicant for permit to appropriate water, three dollars.

(b) For filing and recording permit to appropriate water for irrigation purposes, fifteen cents per acre for each acre to be irrigated up to and including one hundred acres, and five cents per acre for each acre in excess of one hundred and up to and including one thousand acres; and one cent per acre for each acre in excess of one thousand acres, or in case the application is for power purposes, twenty-five cents for each theoretical horsepower to be developed up to and including one hundred, and ten cents for each horsepower in excess of one hundred and up to and including one thousand, and five cents for each horsepower in excess of one thousand; or, in case the application is for any other purpose, including applications by municipalities for power purposes, five dollars for filing and recording each permit.

(c) For filing or recording any other water right instrument, one dollar for the first hundred words and ten cents for each additional hundred words or fraction thereof.

(d) For making copy of any document recorded or filed in his office, ten cents for each hundred words or fraction thereof; but where the amount exceeds $5.00, then only the actual cost in excess of that amount shall be charged.

(e) For certifying to copies, documents, records, or maps, one dollar for each certificate.

(f) For blue print copy of any map or drawing, ten cents per square foot or fraction thereof. For such other work as may be required of his office, actual cost of the work.

Section 53. Water Right Certificate.—Upon it being made to appear to the satisfaction of the Board of Control that any appropriation has been perfected in accordance with the provisions of this act, it shall be the duty of the Board of Control to issue to the applicant a certificate of the same character as that described in Section 25. Said certificate shall be recorded and transmitted to the applicant as provided

in said section. Certificates issued for rights to the use of water for power development acquired under the provisions of this act shall limit the right or franchise to a period of forty years from date of application, subject to a preference right of renewal under the laws existing at the date of expiration of such franchise or right.

Section 54. Date of Right.—The right acquired by such appropriation shall date from the filing of the application in the office of the State Engineer.

Section 55. Headgate, Maintenance of.—The owner or owners of any ditch or canal shall maintain, to the satisfaction of the division superintendent of the division in which the irrigation works are located, a substantial headgate at the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by the water master; and such owners shall construct and maintain when required by the division superintendent, suitable measuring devices at such points along such ditch as may be necessary for the purpose of assisting the water master in determining the amount of water that is to be diverted into said ditch from the stream, or taken from it by the various users. Any and every owner or manager of a reservoir, located across or upon the bed of a natural stream, shall be required to construct and maintain, when required by the division superintendent, a measuring device of a plan to be approved by the State Engineer, below such reservoir, and a measuring device above such reservoir on each or every stream or source of supply discharging into such reservoir, for the purpose of assisting the water master or superintendent in determining the amount of water to which appropriators are entitled and thereafter diverting it for such appropriators' use. When it may be necessary for the protection of other water users, the division superintendent may require flumes to be installed along the line of any ditch. If any such owner or owners of irrigation works shall refuse or neglect to construct and put in such headgates, flumes or measuring devices after ten days' notice, the division

superintendent may close such ditch, and the same shall not be opened or any water diverted from the source of supply, under the penalties prescribed by law for the opening of headgates lawfully closed, until the requirements of the division superintendent as to such headgate, flumes or measuring device have been complied with, and if any owner or manager of a reservoir located across the bed of a natural stream shall neglect or refuse to put in such measuring device after ten days' notice by the division superintendent, such superintendent may open the sluice gate or outlet of such reservoir and the same shall not be closed under penalties of the law for changing or interfering with headgates, until the requirements of the division superintendent as to such measuring devices are complied with.

Section 56. Engineer's Authority to Inspect.—The State Engineer shall have authority to examine and inspect, during construction, any dam, authorized under the provisions of this chapter, or any ditch, canal or other work, and at the time of such inspection, or thereafter, he shall notify the parties constructing such dam, or other works, of any addition or alteration which he considers necessary for the security of the work or the safety of any person or persons residing on or owning land in the vicinity of such works, or for the safety of their property.

Section 57. Inspection; When Required.—Should any person or persons residing on or owning land in the neighborhood of any irrigation works after completion, or in course of construction, apply to the State Engineer in writing desiring an inspection of such works, the State Engineer may order an inspection thereof. Before doing so he may require the applicant for such inspection to make a deposit of a sum of money sufficient to pay the expenses of an inspection, and in case the application appears to him not to have been justified, he may cause the whole or part of such expenses to be paid out of such deposit. In case the application appears to the State Engineer to have been justified, he may require the owner of the works to

pay the whole or any part of the expenses of the inspection, and the same shall constitute a valid lien against the works, which may be enforced in the same manner as provided for the enforcement of mechanics' liens.

RESERVOIRS.

Section 58. Procedure Under Reservoir Permit.—All applications for reservoir permits shall be subject to the provisions of Sections 45 to 51, both inclusive, except that an enumeration of any lands proposed to be irrigated under this act shall not be required in the primary permit. But the party or parties proposing to apply to a beneficial use the water stored in any such reservoir shall file an application for permit, to be known herein as the secondary permit, in compliance with the provisions of Sections 45 to 51, both inclusive. Said application shall refer to such reservoir for a supply of water and shall show by documentary evidence that an agreement has been entered into with the owners of the reservoir for a permanent and sufficient interest in said reservoir to impound enough water for the purposes set forth in said application. When beneficial use has been completed and perfected under the secondary permit, the division superintendent shall take the proof of the water user under such permit and the final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit.

Section 59. Duty of Water Master and Costs; l w Payable.—Whenever the owner, manager or lessee of a reservoir, constructed under the provisions of this act shall desire to use the bed of a stream, or other water-course, for the purpose of carrying stored or impounded water from the reservoir to the consumer thereof, he shall, in writing, notify the water master of the district, in which the stored or impounded water is to be used, giving the date when it is proposed to discharge water from such reservoir, its volume, and the names of all persons and ditches entitled to its use. It shall then be the duty of such water master to close,

or so adjust the headgates of all ditches from the stream or watercourse, not entitled to the use of such stored water, as will enable those having the right to secure the volume to which they are entitled. The water master shall keep a true and just account of the time spent by him in the discharge of his duties as defined in this section, and it shall be the duty of the county commissioners of the county wherein the expense is incurred, to present a bill of one-half the expense so incurred to the reservoir owner, manager or lessee, and if such owner, manager or lessee shall neglect for thirty days, after the presentation of such bill of costs, to pay the same, the said costs shall be made a charge upon said reservoir and shall be collected as delinquent taxes until the complete payment of such bill of costs has been made.

Section 60. Attorney-General and District Attorneys Advisors of State Engineer.—The Attorney-General and the district or prosecuting attorney of the county in which legal questions arise, shall be the legal advisors of the State Engineer and of the Board of Control, and shall perform any and all legal duties necessary in connection with their work, without other compensation than their salaries as fixed by law.

Section 61. Joint Owners; Responsibility.—In all cases where ditches are owned by two or more persons and one of more of such persons shall fail or neglect to do a proportionate share of the work necessary for the proper maintenance and operation of such ditch or ditches or to construct suitable headgates or measuring devices at the points where water is diverted from the main ditch, such owner or owners desiring the performance of such work may, after having given ten days' written notice to such other owner or owners, who have failed to perform such proportionate share of the work, necessary for the operation and maintenance of said ditch or ditches, perform such share of the work, and recover therefor from such person or persons in default the reasonable expense of such work.

Section 62. Lien for Work Performed on Ditch.—Upon the failure of any co-owner to pay his propor-

tionate share of such expense, as mentioned in the preceding section, within thirty days after receiving a statement of the same as performed by his co-owner or owners, such person or persons so performing such labor may secure payment of said claim by filing an itemized and sworn statement thereof, setting forth the date of the performance and the nature of the labor so performed, with the county clerk of the county wherein said ditch is situated, and when so filed it shall constitute a valid lien against the interest of such person or persons in default, which said lien may be established and enforced in the same manner as provided by law for the enforcement of mechanics' liens.

Section 63. Regulation of Partnership Ditches and Reservoirs.—When two or more persons, joint owners in an irrigation ditch or reservoir, not incorporated, or their lessees, are unable to agree relative to the division or distribution of water received through their ditch or from their reservoir, it shall be lawful for any such owner or owners, his or their lessee or lessees, or either of them, to apply to the water master of the district in which such ditch or reservoir shall be located, by a written notice setting forth such fact, asking the water master to take charge of such ditch or reservoir for the purpose of making a just division or distribution of the water from the same, to the parties entitled to the use thereof. The said water master shall take exclusive charge of such ditch or reservoir for the purpose of dividing the water therefrom in accordance with established rights, and continuing the said work until the necessity therefor shall cease to exist. In all cases where the water master or an assistant water master is called upon to divide the waters of a ditch or reservoir between appropriators, he shall be paid in full for his services by the interested water users in proportion to the established rights of each, and shall have a lien upon any land irrigated by the water owned by an interested water user refusing to pay, said lien to be established and enforced in the same manner as a mechanics' lien.

Section 64. Injunctions.—In suits for injunction

affecting the use of water from streams upon which the rights to water have been determined, no restraining order shall be granted before hearing had after at least three days' notice thereof, served upon all persons defendant. All suits for injunction involving the use of water shall be heard, either in term time or during vacation, not later than fifteen days after issues joined, unless for good cause shown further time be allowed.

Section 65. Water Appurtenant to Land for Irrigation Purposes.—All water used in this State for irrigation purposes shall remain appurtenant to the land upon which it is used; *provided*, that if for any reason it should be at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the water is appurtenant, said right may be severed from said land, and simultaneously transferred, and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights, on the approval of an application of the owner to the Board of Control. Before the approval of such transfer an inspection shall be made by the proper division superintendent, who shall submit his report to the Board of Control, whereupon, by order, the board shall approve or disapprove such transfer and prescribe the conditions therefor. Such order shall be subject to appeal as in this act provided.

Section 66. Unlawful Use of Water and Waste.—The unauthorized use of water to which another person is entitled, or the willful waste of water to the detriment of another, shall be a misdemeanor, and the possession or use of such water without legal right, shall be *prima facie* evidence of the guilt of the person using it. It shall also be a misdemeanor to use, store, or divert any water until after the issuance of permit to appropriate such waters.

Section 67. Obstructing Works.—Whenever any appropriator of water has the lawful right of way for the storage, diversion, or carriage of water, it shall

be unlawful to place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto. Any violation of the provisions of this section shall be a misdemeanor.

Section 68. Penalty for Misdemeanors Under This Act.—All violations of the provisions of this act, declared herein to be misdemeanor, shall be punished by a fine not exceeding two hundred and fifty dollars nor less than ten dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Section 69. Appropriations.—There is hereby appropriated out of any moneys in the general fund of the State Treasury not otherwise appropriated the sum of $10,000 annually, or so much thereof as may be necessary for the payment of the salaries and expenses incurred by the Board of Control under the provisions of this act.

There is hereby appropriated out of any moneys in the general fund of the State Treasury not otherwise appropriated the sum of $5,000 annually, or so much thereof as may be necessary for the salary and expenses of the State Engineer, and the services of assistants, and expenses of the office and department of the State Engineer, which appropriation is in addition to the $5,000 annual appropriation heretofore made in Chapter 228, Session Laws of 1905.

All salaries and expenses incurred, and material and supplies furnished under the provisions of this act shall be paid at the same time and in the same manner as those of other officers of the State.

Section 70. Vested Rights Preserved.—

1. Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.

2. Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use;

provided, such use has not been abandoned for a continuous period of two years.

3. And where any riparian proprietor, or under authority of any riparian proprietor or his or its predecessor in interest, any person or corporation shall, at the time this act is filed in the office of the Secretary of State, be engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use such water shall be deemed vested in such riparian proprietor; provided, such works shall be completed and said water devoted to a beneficial use within a reasonable time after the passage of this act. The Board of Control, in the manner hereinafter provided, shall have power and authority to determine the time within which such water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the Board of Control.

4. Nor shall anything in this act contained affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined or pending prior to the taking effect of this act.

5. Nor shall the right of any person, association or corporation, to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated prior to the filing of this act in the office of the Secretary of State, and such appropriators, their heirs, successors or assigns, shall, in good faith and in compliance with laws existing at the time of filing this act in the office of the Secretary of State, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecute such work diligently and continuously to completion, but all such rights shall be adjudicated in the manner provided in this act.

6. The Board of Control shall have authority, and shall for good cause, shown upon the application of any appropriator, or user of water under an appropriation of water made prior to the passage of this

act, or in the cases mentioned in subdivisions 3 and 5 of this section, where actual construction work has been commenced prior to said time or within the time provided in law existing at the time of filing this act in the office of the Secretary of State, to prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use, and in determining said time shall grant a reasonable time after the construction of the works, or canal, or ditch, used for the diversion of the water, and in doing so shall take into consideration the cost of the appropriation and application of such water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. Upon making such order the Board of Control shall direct the State Engineer to issue a certificate showing such determination. For good cause shown the Board of Control may extend the time by granting further certificates.

7. And where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in procedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof.

8. All rights granted or declared by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act. This act shall not be held to bestow upon any person, association, or corporation, any riparian rights where no such rights existed prior to the time this act takes effect.

Section 71. Portland Water Supply.—The exclusive right to the use of the waters of Bull Run and Little Sandy rivers is hereby granted to the city of Portland, and all rights to the waters of the lakes, rivers and streams of this State heretofore acquired for the purposes of municipal water supply are hereby confirmed,

and no rights which shall be acquired under this act shall impair the rights of any municipal corporation to waters heretofore taken. The Board of Control shall reject, or grant, subject to municipal use, all applications where, in its judgment, the appropriation of the waters applied for impair a municipal water supply. It shall be the duty of municipal corporations of the State, on request of the State Engineer, to furnish to him a statement of the amount and source of the municipal water supply, with probable increase or extension of the same; provided, that this act shall not be deemed or held to and shall not impair the rights of any person, association or corporation who may, at and prior to the time this act is filed in the office of the Secretary of State, have any vested right to or valid appropriation or bona fide notice of appropriation of the waters of either the Bull Run or the Little Sandy river, under laws heretofore in effect or under any valid contract or deed of conveyance heretofore made with or by the city of Portland.

Section 72. Eminent Domain.—The United States, the State, or any person, foreign or domestic corporation or association, may exercise the right of eminent domain to acquire for a public use any property or rights now or hereafter existing when found necessary for the application of water to beneficial uses, including the right to enlarge existing structures and use the same in common with the former owner. Any right of way so acquired shall be so located as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such property or rights may be acquired in the manner provided by law for the taking of private property for public use.

The right to conduct water from or over the land of another for any public use, including the right to raise any water by means of dams, reservoirs or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor, may be acquired upon payment of just compensation in the manner provided

by law for the taking of private property for public use.

Section 73. Repeal.—All laws and parts of laws so far as in conflict or inconsistent with the provisions of this act are hereby repealed.

Section 74. Emergency.—WHEREAS, there is great uncertainty existing throughout the State with reference to the water rights of various parties along the streams, ditches and waterways as to their several interests therein, entailing expensive litigation and engendering many animosities and much bad blood, thereby endangering the public peace and safety of many sections of the State, and WHEREAS, it is urgent that these conditions be remedied for the preservation of the public peace, health and safety of the State, this act shall be in full force and effect from and after its approval by the Governor.

Filed in the office of the Secretary of State February 24, 1909.

POLICE POWER—EMERGENCY CLAUSE

The Emergency clause attached to the foregoing Water Code of 1909, Section 74, thereof, is cited in the majority opinion (page 21 of the Opinion) as establishing that said Water Code purported to be exercise of the police power of the state. The language of the Opinion is:

> "The Oregon Code of 1909 itself purported to be an exercise of the police power of the State, as shown by Section 74. Emergency."

At the time of the passage of the Act, the emergency clause was used to prevent laws being referred to the people under what the Oregon Constitution calls the "*Referendym.*" That was practically the sole use of the emergency clause of the Act, cited at the bottom of

page 21 of the majority opinion, and in this appendix at xxxiii.

In fact Colorado, Arizona, Ohio, and other states which borrowed from Oregon the referendum provision of its constitution, followed the doctrine of the Supreme Court of Oregon as announced in the *Kadderly* case, cited below.

OREGON REFERENDUM AMENDMENT

The initiative and referendum amendment to the Oregon Constitution is an amendment of Article IV and follows: (June 2nd, 1902).

Oregon Code Annotated, official edition 1930, Volume 1, page 96.

"ARTICLE IV.

LEGISLATIVE DEPARTMENT.

§ 1. Legislative authority—Style of bill—Initiative and referendum. The legislative authority of the state shall be vested in a legislative assembly consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. *The second power is the referendum, and it may be ordered (except as to laws necessary for the immedi-*

ate preservation of the public peace, health, or safety), either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded * * *.

Section 28 of Article IV of the Oregon Constitution, said Volume 1, Oregon Code, page 120, reads:

"§ 28. When act to take effect.—No act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of emergency; which emergency shall be declared in the preamble or in the body of the law."

THE KADDERLY CASE

The use of the emergency clause is not a legislative declaration that the act is the exercise of the state police power.

The following quotations from the Kadderly case, and those citing it follow:

Kadderly v. Portland, 44 Or. 118 *(Dec. 1903)*, (74 Pac. 710, 75 Pac. 222).

Quotation from Point 10, pages 146 to 151, inclusive, of the Oregon Report:

"10. This brings us to the question as to whether the legislative declaration that the Portland charter was necessary for the preservation of the public peace, health, and safety is conclusive on the courts. Under the initiative and referendum amendment, laws 'necessary for the immediate

preservation of the public peace, health, or safety' are excepted from its operation. *As to them, the action of the legislative and executive departments is conclusive and final, so far as their enactment is concerned. No power is reserved to the people to approve or disapprove them.* They are not subject to the referendum amendment, and as to them the powers of the other departments of the government derived from the constitution are unaffected. The legislative assembly may, in its discretion, put them into operation through an emergency clause, as provided in the Constitution of Oregon, Article IV, § 28, or it may allow them to become laws without an emergency clause, the necessity or expediency of either course being a matter for its exclusive determination. As to all other laws the amendment applies, and they cannot be made to go into operation for 90 days after the adjournment of the session at which they were adopted, or until after approval by the people if the referendum is invoked. The Constitution of Oregon, Article IV, § 28, giving the legislative assembly power to put any law into force upon approval by declaring an emergency, has been modified by the amendment of 1902, so as to exclude from the power to declare an emergency all laws except those necessary for the immediate preservation of the public peace, health, or safety. So far, all are agreed. But the vital question is, what tribunal is to determine whether a law does or does not fall under this classification? Are the judgment and findings of the legislative assembly conclusive, or are they subject to review by the courts? *The inquiry is much simplified by bearing in mind that the exception in the constitutional amendment is not confined to such laws as the legislative assembly may legally enact by virtue of the police powers of the State, or to those alone that may affect the public peace, health, or safety. The police power is limited to the imposition of restraints and burdens on persons and property, in order to secure the general comfort, health, and*

prosperity of the state: Tiedeman, Lim. Pol. Power, § 1. But the language of the constitutional amendment is broader, and includes all laws, of whatsoever kind, necessary for the immediate preservation of the public peace, health, or safety, whether they impose restraints on persons and property, or come strictly within the police powers, or not. The laws excepted from the operation of the amendment do not depend alone *upon their character,* but upon the necessity for their enactment in order to accomplish certain purposes. *As to such laws the amendment of 1902 does not in any way abridge or restrict the power of the legislature, which, by the insertion of a proper emergency clause, may unquestionably cause them to go into effect upon approval by the Governor.* As the legislature may exercise this power when a measure is in fact necessary for the purposes stated, and as the amendment does not declare *what shall be deemed laws of the character indicated,* who is to decide whether a specific act may or may not be necessary for the purpose? Most unquestionably, those who make the laws are required, in the process of their enactment, to pass upon all questions of expediency and necessity connected therewith, and must therefore determine whether a given law is necessary for the preservation of the public peace, health, and safety.

It has always been the rule, and is now everywhere understood, that the judgment of the legislative and executive departments as to the wisdom, expediency, or necessity of any given law is conclusive on the courts, and cannot be reviewed or called in question by them. *It is the duty of the courts, after a law has been enacted, to determine in a proper proceeding whether it conflicts with the fundamental law, and to construe and interpret it so as to ascertain the rights of the parties litigant. The powers of the courts do not extend to the mere question of expediency,* or *necessity,* but, as said by Mr. Justice Brewer, 'they are wrought out and fought out in the legislature and before

the people. Here the single question is one of power. We make no laws. We change no constitutions. We inaugurate no policy. When the legislature enacts a law, the only question which we can decide is whether the limitations of the constitution have been infringed upon': Prohibitory Am. Cas. 24 Kan. 700, 706. The amendment excepts such laws as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The constitution does not confer it upon any tribunal. It must therefore necessarily reside with that department of the government which is called upon to exercise the power. It is a question of which the legislature alone must be the judge, and when it decides the fact to exist, its action is final: *Biggs v. McBride*, 17 Or. 640 (21 Pac. 878, 5 L. R. A. 115); *Umatilla Irrig. Co. v. Barnhart*, 22 Or. 389 (30 Pac. 37); *Gentile v. State*, 29 Ind. 409; *Wheeler v. Chubbuck*, 16 Ill. 361; *Sutherland*, Stat. Const. 108.

Cameron v. Stevens, 121 Or. 538 (1927), 256 Pac. 395.

Quotation from Oregon Report, 544-5:

"5-8. The effect of an emergency clause upon acts passed by the legislature is to cause the act to take effect at once upon its approval by the Governor and to *prevent its not going into effect* until after the expiration of the period otherwise prescribed by the Constitution. *What* may be deemed an emergency for this purpose is purely a legislative question. The courts will not inquire into it, nor entertain any question of its sufficiency: *1 Lewis' Sutherland on Statutory Const.* (2 ed.), § 176: Hence, it would *seem to follow that unless expressly prohibited by some constitutional provision, the legislature has as much power to prescribe when an act shall take effect as it has to*

enact the law itself, and that in order to make it take effect at once, it has the power to declare an emergency, and when so declared the act is not subject to the referendum powers of the people."

COLORADO

Shields et al v. City of Loveland et al, 74 Colo. 27 (July 2, 1923), 218 Pac. 913.

Quotation from the Pacific Reporter reference, page 915:

"*Article 5 of our Constitution is borrowed from Oregon almost literally,* and at the time of its adoption the Oregon courts had already held on this point in favor of the defendants in error, *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, and later in *Thielke v. Albee*, 79 Or. 48, 153 Pac. 793, and so we held. See *Van Kleeck v. Ramer*, 62 Colo. 4, 156 Pac. 1108; *People v. Ramer*, 61 Colo. 422, 158 Pac. 146; *In re Senate Resolution*, 54 Colo. 262, 130 Pac. 333. So Ohio, *Shyrock v. Zanesville*, 92 Ohio St. 375, 110 N. E. 937."

In re Senate Resolution Number 4, Supreme Court of Colorado, (Feb. 28, 1913), 54 Colo. 262, 130 Pac. 333.

Quotation from Pacific Reporter reference, page 336, Point 3:

"(3) The next question is, Can the General Assembly lawfully prevent the proposed act from being *referred* by the declaration contained in section 6 thereof? To answer this, reference must again be had to the constitutional provision under consideration. It provides that the power reserved designated the 'Referendum' 'may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety.' Whether a law is of this character is for the General Assembly to determine, and, when it so de-

termines, by a declaration to that effect in the body of a proposed act, we are of the opinion that *such declaration is conclusive upon all departments* of government, and all parties, in so far *as it abridges the right, to invoke* the referendum. Such a declaration is a part of the act, and may be passed by the majority required to pass any act, and is in no sense an emergency clause, as contemplated by Article 5, § 19."

To the same effect is

Van Kleeck v. Ramer, 62 Colo. 4, 156 Pac. 1108 (Apr. 3, 1916).

ARIZONA

Arizona has a similar referendum amendment, similarly construed. In its Supreme Court in defining the office of the emergency clause, with reference to its referendum, it cited with approval and followed the Oregon case of Kadderly vs. Portland, in

Orme v. Salt River Water Users' Association, 25 Ariz. 324, 217 Pac. 935 (1923).

OHIO

Ohio took its referendum provision from the Oregon Constitution, as stated in

State ex rel. Durbin v. Smith, 102 Ohio State, 591, 133 N. E. Rep. 457 (June 16, 1921).

It cited with approval and followed the Kadderly case, supra.

COMMON LAW

STATES DETERMINE FOR THEMSELVES WHETHER THEY ADOPT COMMON LAW RIPARIAN DOCTRINE.

Kansas v. Colorado, 206 U. S., pages 46-118, 27 Sup. Ct. 655, 51 L. Ed. 956.

We quote from 51 Law Ed. 973, which we believe to be page 94 of the U. S. Reports, as follows:

"It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the *arid regions of the West* of the appropriation of waters for the *purposes of irrigation shall control.* Congress cannot enforce either rule upon any state. It is undoubtedly true that the *early settlers brought to this country the common law of England,* and that that common law throws light on the meaning and scope of the Constitution of the United States, and is also in many states expressly recognized as of controlling force in the absence of express statute. As said by Mr. Justice Grey in *United States v. Wong Kim Ark,* 169 U. S. 649, 654, 42 L. Ed. 890, 893, 18 Sup. Ct. Rep. 456, 459:

'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett,* 21 Wall. 162, 22 L. Ed. 627; *Ex parte Wilson,* 114 U. S. 417, 422, 29 L. Ed. 89, 91, 5 Sup. Ct. Rep. 935; *Boyd v. United States,* 116 U. S. 616, 624, 625, 29 L. Ed. 746, 748, 749, 6 Sup. Ct. Rep. 524; *Smith v. Alabama,* 124 U. S. 465, 31 L. Ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. The language of the Constitution, as has been well said, could not be understood without reference to the common law. I Kent. Com. 336; Bradley, J., in *Moore v. United States,* 91 U. S. 270, 274, 23 L. Ed. 346, 347'."

THE COMMON LAW ADOPTED ON ADMISSION OF OREGON

Speaking of common law in Oregon, Mr. Justice Gray in

Shively v. Bowlby, 152 U. S. 1, 52 (38 L. Ed. 331, 350),

said:

> "The settlers of Oregon, like the colonists of the Atlantic States, coming from a country in which the common law prevailed to one that had no organized goverment, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefor, is based on the common law."

See also:

United States F. & G. Co. v. Bramwell, 108 Or., pages 261-289. *July 10, 1923* (217 Pac. 332).

Quotation from pages 264-266:

> "The common law of England, modified and amended by English statutes, as it existed at the time of the American Revolution, as far as it was general and not local in its nature and applicable to the conditions of the people and not incompatible with the nature of our political institutions or in conflict with the Constitution and laws of the United States or of this State, except as modified, changed or repealed by our own statutes, has been adopted and is in force in this state: *Perry v. Fletcher*, 93 Or. 43 (182 Pac. 143).
>
> By Section 2, Article I of the Organic Law of the provisional government of Oregon, adopted by the vote of the people on July 26, 1845, it was declared that:
>
> > 'The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings, according to the course of common law.' * * * * * * * *
>
> "Section 7, Article XVIII of the Constitution, adopted by the people on September 18, 1857, pro-

vides that 'All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until *altered or repealed*'."

In

Fidelity, etc., Co. v. State Bank of Portland, 117 Or. 1, 5. *January 19, 1926*, (242 Pac. 823),

Quotation from page 5:

"It is our understanding that we are as much bound by the applicable rules of the common law, where such rules have not been modified, or abrogated by statute, as we are by the statutes themselves."

THE COMMON LAW DOCTRINE OF RIPARIAN RIGHTS, AS ANNOUNCED IN THIS COURT, IS SET FORTH IN THE FOLLOWING CITATION:

U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 19 Sup. Ct. 770, at 43 L. Ed. 1141;

"The unquestioned rule of the common law was that *every riparian owner* was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, Sec. 439):

'Every proprietor of lands on the bank of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run *(currere solebat)* without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple *usufruct* while it passes

along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land *as an incident to the land* he cannot unreasonably detain it, or give it *another direction* and he must return it to its ordinary channel when it leaves his estate'."

Sturr, Appellant, v. Beck, 133 U. S. 541-552, 33 Law Ed. 761. (Decided March 3, 1890).

Quotation from Mr. Chief Justice Fuller, Law Ed. page 763-4-5:

"John Smith settled on the tract of land described in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to Beck, the appellee. He made his homestead filing or entry March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The water of False Bottom Creek flowed in its natural channel over and across Smith's homestead, and in May, 1880, Sturr, the appellant, went upon that homestead, located a water right thereon and constructed a ditch which diverted the waters of the creek to his own adjacent land. Beck went into possession under the deed from Smith, and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, and this suit thereupon followed.

It is not contended on behalf of Sturr that he is entitled to maintain the ditch because he constructed and used it, or that Smith's acquiescence amounted to anything more than a revocable license. There was no grant nor an adverse enjoyment so long continued as to raise a legal presumption of a grant. But it is insisted that the doctrine of prior appropriation of water on the public land and its beneficial use protects him from interference because neither Smith nor Beck made any water right location claiming the waters

of False Bottom Creek, and had never diverted those waters prior to Sturr's location.

If, however Smith obtained a vested right to have the creek flow in its natural channel by virtue of his homestead entry of *March 25, 1879*, and possession *thereunder*, or if *his patent* took effect as against Sturr by relation as of *that date*, then it is conceded that Sturr cannot prevail and the judgment must be affirmed.

The right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters as a natural incident to, or one of the elements of, his estate, and that it cannot be lawfully diverted against his consent, is not denied, nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor of a prior appropriator, as between himself and Sturr, when the latter undertook to locate his alleged water right. At that time Smith had been in possession for three years, and his homestead entry had been made over a year. * * *

By Section 17 of the Act of July 9, 1870, amendatory of the Act of July 26, 1866, it was provided, among other things, that 'all patents granted, or pre-emption or homesteads allowed, shall be subject to any *vested* and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as *may have been acquired* under or recognized by the ninth section of the Act of which this Act is amendatory.' 16 Stat. 218. And this was carried forward into section 2340 of the Revised Statutes, and *Smith's patent was subject to that reservation.*

The 9th section of the Act of 1866 is referred to by Mr. Justice Field in *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 512 (22: 414, 416), and in the opinion it is said that 'the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no

occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams.'

WHEN, HOWEVER, THE GOVERNMENT CEASES TO BE THE SOLE PROPRIETOR, THE RIGHT OF THE RIPARIAN OWNER ATTACHES, AND CANNOT BE SUBSEQUENTLY INVADED. As the riparian owner has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriations of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."

We come now to the Oregon case

Faull v. Cooke, 19 Or. 455-466, 26 Pac. 662. (July 1st, 1890).

Quotation from page 463:

"In *Larsen v. The O. R. & N. Co.*, decided at the present term, it was held, in effect, that a settlement made by a homestead claimant upon the public lands of the United States and compliance with act of congress on the subject, segregated the same from the public lands and cut off intervening claims, and such is the ruling of the land department of the United States.

Since the announcement of the opinion in *Larsen v. The O. R. & N. Co., supra*, this case was argued, and *our attention has been called to the recent opinion of the Supreme Court of the United States in Steers v. Beck*, 10 Fed. R. 350.

The opinion of the court in that case is very exhaustive, and fully and conclusively settles the legal question under consideration adversely to the appellant. In that case the identical question, in principal, involved here was presented, and it

was held that a *homestead claimant's riparian rights attached from the date of his settlement*, provided *he complied with the law* and obtained a patent for the land, and that when such patent was issued it related to the date of settlement *and cut off the right to divert a stream of water running through such homestead.*"

In

Baker v. Brown, 39 Ore. 66-75, 65 Pac. 799, 66 Pac. 193 (Decided July 15th, 1901)

the Supreme Court followed Faull v. Cooke, the Larsen case, Johnson v. Logan et al, and held:

"The right of a prior appropriation is limited to the use of the water by the pioneer settler BEFORE ANY ADVERSE CLAIMS OF RIPARIAN PROPRIETORS ATTACH TO THE STREAM FROM WHICH THE WATER IS TAKEN."

ADDITIONAL CASES SHOWING APPLICATION OF THE COMMON LAW RIPARIAN DOCTRINE IN THE OREGON SUPREME COURT IN DATES RANGING FROM 1899 TO 1912.

These cases show that a right by appropriation could not destroy a riparian right, except by adverse possession and use for the period of ten consecutive years.

Bowman v. Bowman, 35 Or. 279, 283 (57 Pac. 546);
Carson v. Hayes, 39 Or. 97 (65 Pac. 814);
Oregon Construction Company v. Allen Ditch Co., 41 Or. 209, 216 (69 Pac. 455, 93 Am. St. Rep. 701);
Britt v. Reed, 42 Or. 76, 83 (70 Pac. 1029, 1030);
Davis v. Chamberlain, 51 Or. 304 (98 Pac. 154);

Ison v. Sturgill, 57 Or. 109, 118 (109 Pac. 579, 110 Pac. 535);
Cantrall v. Sterling Min. Co., 61 Or. 516, 524, (122 Pac. 42)."

The dates upon which the foregoing decisions were rendered, range from the date of the Bowman case, in 35 Oregon, 1899, to that of the Cantrall v. Sterling Min. Co. case in 61 Oregon, 1912.

HOUGH V. PORTER

51 Or. 318-456 (95 Pac. 732, 98 Pac. 1083).

The only exception which we have noted is to be found in the celebrated case of Hough v. Porter, argued February 7, 1908, finally decided January 5, 1909, at the time of the session which passed the Water Code.

As the appellate court has practically held, the Desert Land Act is not subject to being construed as destroying riparian rights in lands in Oregon, patented subsequent to the enactment of the Desert Land Act, we are concerned only with syllabus paragraph 28, pages 404-5 of the 51st Oregon. The only point to Hough v. Porter is its *alleged destruction of vested rights in such lands*.

We follow with copy of the Desert Land Act:

THE DESERT LAND ACT

This is the Act of March 3rd, 1877, Title 43, United States Code Annotated, set forth in Sections 321, 322, 323 and 324.

"Section 321. Entry right generally; extent of

right to appropriate waters. It shall be lawful for any citizen of the United States, or any person of requisite age, 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of 25 cents per acre —to file a declaration under oath with the register and the receiver* of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter; provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated; and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, *shall remain and be held free* for the appropriation and use of the public for irrigation, mining and manufacturing purposes *subject to existing rights.* Said declaration shall describe particularly said one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him: Provided, That no person shall be permitted to enter more than one tract of land and not to exceed three hundred and twenty acres which shall be in compact form. (Mar. 3, 1877, c. 107, Sec. 1, 19 Stat. 377; Mar. 3, 1891, c. 561, Sec. 2, 26 Stat. 1096).

Section 322. Desert Lands defined; question how determined. All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this chapter, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

The *determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.* (Mar. 3, 1877, c. 107, Section 2, 3, 19 Stat. 377).

Section 323. States in which chapter applies. This chapter shall only apply to and take effect in the States of California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota. (March 3, 1877, c. 107, Sec. 3,* 19 Stat. 377; Mar. 3, 1891, c. 561, Sec. 2, 26 Stat. 1096).

Section 324. Assignment of entries. No assignment after March 28, 1908, of an entry made under this chapter shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under this chapter of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized. (Mar. 28, 1908, c. 112, Sec. 2, 35 Stat. 52).

DECISIONS SUBSEQUENT TO THE ENACTMENT OF THE WATER CODE

There were many decisions involving riparian rights.

We quote from:

In re Willow Creek, 74 Or. 593-655, (144 Pac. 505, 146 Pac. 475). *(1915)*

Quotation from Oregon Report, pages 626-7:

"22. In *Jones v. Conn*, 39 Or. 30 (64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630), it was held in a controversy between riparian proprietors upon a natural watercourse, that a riparian proprietor has a right to the use and enjoyment of the water that naturally flows past or through his land, subject to the right of other riparian owners to a reasonable use thereof for domestic, agricultural and manufacturing purposes, provided that the upper proprietor does not appropriate enough to substantially injure the common right which each proproprietor has. * * *The doctrine of prior appropriation and riparian rights is not so antagonistic that they may not exist in the same locality.* A settler on a non-navigable stream has the election either to rely upon his rights as riparian proprietor or to make an appropriation of the water and claim as an appropriator, but he cannot do both: *Williams v. Altnow*, 51 Or. 277, 300 (95 Pac. 200, 97 Pac. 539); *Crawford v. Hathaway*, 60 Neb. 754 (84 N. W. 271); *Crawford v. Hathaway*, 61 Neb. 317 (85 N. W. 303); *Crawford v. Hathaway*, 67 Neb. 325 (93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889)."

Page 627:

"24. In the arid and semi-arid lands of the west the early home-builders first settled upon the streams and other bodies of water. The rights of such people to a reasonable use and benefit of the water flowing over their lands which they have appropriated or used for a beneficial purpose should be carefully considered and not abrogated. Those obtaining title to land take the same subject to the laws *then* prevailing and defining the appurtenances thereto. When *such rights have become vested*, they cannot be taken away by legislative enactment nor judicial decree. Like all

property they are subject to reasonable regulation."

Page 624:

"By act of Congress, July 26, 1866, Chapter 262, 14 Stat. 253 Section 9, (§2339, R. S. U. S., 7 Fed. Stats. Ann. 1090, 1093, U. S. Comp. Stats. 1913, § 4647), whenever rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued by priority of possession and are acknowledged by local customs, laws, and decisions of courts, the same are recognized and protected. This act established no new right. The practical construction of this statute has been that as long as the land belonged to the United States the water flowing over the same was subject to appropriation for any of the purposes named when such appropriation was recognized by the local customs, laws or decisions of the courts; *but if the water was not so appropriated, it was not subject to appropriation after the land over which it flowed became private property: Davis v. Chamberlain*, 51 Or. 304, 315 (98 Pac. 154); *Broder v. Water Co.* 101 U. S. 274, (25 L. Ed. 790); *Rio Grande Western R. R. Co. v. Telluride P. & T. Co.*, 16 Utah, 125, 137 (51 Pac. 146); *Benton v. Johncox*, 17 Wash. 277, 287 (49 Pac. 495, 61 Am. St. Rep. 912, 39 L. R. A. 107); *Sturr v. Beck*, 133 U. S. 541 (33 L. Ed. 761, 10 Sup. Ct. Rep. 850)."

We quote from the Norwood case:

NORWOOD CASE

Norwood v. Eastern Oregon Land Company, 112 Or. 106; *(227 Pac. 1111)*, (1924).

Quotation from page 111 of the Oregon report

"2. The riparian rights of the defendant company, as such, date back to the year 1867 *when it*

and its predecessors in title acquired the ownership of the land."

and from pages 113-4:

"According to the record, all that the company has ever had or claimed to hold is a riparian right. Such a right is appurtenant to the land. In *Jones v. Conn*, 39 Or. 30, 34 (64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630, 53 Cent. L. J. 128), Mr. Chief Justice Robert S. Bean used the following language: 'It is often said that a riparian proprietor has a right, inseparably annexed to the soil, to have the water of a stream flow down to his land as it is wont to run, undiminished in quantity and unimpaired in quality.'

In *Brown v. Baker*, 39 Or. 66 (65 Pac. 799, 68 Pac. 193), Mr. Justice Moore said: 'The water of a non-navigable stream is an incident to the soil through which it flows.'

* * * Riparian rights are purely local, inseparably annexed to the lands washed by the stream at the *place where they border on its waters*. Such rights cannot be divorced from the adjacent lands."

and from page 116:

"We remember that, as determined by the decree of adjudication, the title to the defendant's land was acquired prior to the passage of the Desert Land Act of March 3, 1877, to which reference has been made. *The title of the defendant therefore carried with it the common-law riparian rights which have always been recognized in this state.*"

In the Norwood case, 112 Oregon, at 117, Mr. Justice Burnett, speaking for the court, said:

"The first section of that act says:

'Subject to existing rights, all waters within the state may be appropriated for beneficial use, as

herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water.'

Again, in Section 70 of that act it is said:

'Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.'

The opening declaration of the act was that waters within the state may be appropriated for beneficial use. *The title of the act*, so far as existing rights were concerned, *limits the operation of the statute to 'the determination of existing rights.' Thus controlled in the title of the act as well as by the terms thereof, the legislature could not and did not add to or subtract from the scope of then existing rights.*"

OREGON LEGISLATIVE RECOGNITION OF RIPARIAN RIGHTS ARISING FROM THE LOCATION OF RIPARIAN LANDS ALONG THE STREAMS.

LAWS OF OREGON, 1891,

Page 52. Act approved February 18th, 1891.

An Act entitled: "An Act to provide for the appropiation of water from the lakes and running streams of the State of Oregon" * * * * *"allowing the condemnation of rights of riparian proprietors arising from their locations;"* * * * *.

"Sec. 8. Such corporation may also *maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying*

contiguous to such stream by virtue of their location. Such actions shall be brought in the county where the lands to be affected or some portion thereof are situated, and the manner of procedure therein shall be similar to that prescribed in the preceding section for condemnation of lands; *but no person owning lands lying contiguous to any stream shall, without his consent, be deprived of water for household or domestic use,* or for the purpose of watering his stock, or *of water necessary to* irrigate *crops growing upon such lands, and actually used therefor.*"

OREGON LAWS, 1895,

Page 13. Approved February 20, *1895.*

An Act. entitled: "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes."

Section 45 provides for a rotation system between users when the water is insufficent to fully supply the needs of all.

"Sec. 48. None of the provisions of this Act shall be construed as repealing or in anywise modifying the provisions of any Act relating to the subject of irrigation or water commissioners. *Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal or ditch from its channel, to the detriment of any person or persons having any interest in such river, creek, stream, canal or ditch or the waters therein, unless previous compensation be ascertained and paid therefor,* under the

laws of this state, authorizing the taking of private property for public uses."

OREGON LAWS OF 1899,

Page 172. Act approved February 18th, 1899.

(B. & C. Comp. 5022 et seq.)

An Act entitled: "To provide for the appropriation of water from the lakes and running streams of the State of Oregon for the purpose of developing the mineral resources of the state and for other purposes," * * * * * * "allowing the condemnation of rights of riparian proprietors arising from their location; * * *."

"Section 9. Such persons, companies and corporations may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location. Such action shall be brought in the county where the . . . (The section is incomplete due to some error in its passage).

The foregoing Section 9 of the Act of February 18th, 1899, was amended in the Special Legislative Session of 1903. In the meantime it had been codified in the C. B. Bellinger and W. W. Cotton "Annotated Codes and Statutes of Oregon," Volume 2, and as Section 5030 thereof.

The amendment follows:

LAWS OF 1903, SPECIAL SESSION

Page 25. Filed with the Secretary of State, December 24, 1903.

Entitled: "An Act To Amend Section 5030 of the Laws of Oregon as compiled and annotated by C. B. Bellinger and W. W. Cotton."

As amended:

> "Sec. 5030. Such persons, companies and corporations may also maintain an action *for the condemnation and appropriation of the right to the flow of water in any stream from which it or they propose to divert water below the point of diversion vested in the owners of lands* LYING CONTIGUOUS TO SUCH STREAM BY VIRTUE OF THEIR LOCATION." * * * *

In January, 1905, the Supreme Court of Oregon considered the power of eminent domain clause in this Act, and said:

> "It would seem, however, as authority had been granted to condemn land for a ditch, and also power conferred to condemn the right to have the water of a stream flow in the channel thereof below the point of diversion, *the legislative assembly had not intended to deprive or even abridge the rights of a riparian proprietor.*"

It then added:

> "Condemnation proceedings are purely statutory, and every condition prerequisite to an exercise of the right must be strictly pursued."

Grande Ronde Electric Co. v. Drake, 46 Or. at page 248. (78 Pac. 1031).

OREGON LAWS of 1901,

Page 136. Act of February 25th, 1901.

An Act entitled: "An Act to amend Section 8 of an Act entitled 'An Act to provide for the appropriation of water from lakes and running streams of the State of Oregon" * * * *; "allowing the condemnation of lands for right of way; prescribing the manner of making appropriations and effecting condemnation of lands; *allowing the condemnation of rights of riparian proprietors arising from their location;* * * * * *."

> "§ 8. Such corporation may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of *lands lying contiguous to such stream by virtue of their location.* * * * * *."

OREGON LAWS OF 1905,

Chapter 45, Page 106. Approved February 9, 1905. Oregon Code 1930, § 37-302.

An Act entitled: "An act to provide for the condemnation of real property, water, water courses, and water and riparian rights by the State of Oregon for public use, for the manner of determining the necessity therefor, and the manner of procedure and making payment therefor."

Section 1. This section provides that whenever it is necessary for the state to acquire any real property, water, water courses, and water and riparian rights,

or any interest therein, it may bring, as provided therein, suit to condemn the same, and for assessment of damages.

This act is still in full force and effect, and it is to be found as above stated in Section 37-302, Oregon Code 1930.

PREFACE

We realize that this brief will seem unnecessarily long.

Until the receipt of the opinion in this case the doctrine of the exercise of the police power of the state, as here applied, had never been known by counsel to be involved herein.

It was not discussed, nor urged before the Appellate Court.

The decision being now based *entirely* upon the supposed exercise of the police power by the Legislature, in the enactment of Subdivision 2 of Section 70 of the Code, makes necessary a consideration here of the doctrine of the police power, and of the California cases cited by the court thereon, and of the Peabody case, decided January 31st, 1935.

While we are perhaps justified in assuming that the opinion would not have been based upon the doctrine of the police power, if the court had not determined that petitioner's rights were vested, and could not be taken by a retrospective act, yet, not knowing the position which will now be taken by respondents, it seems necessary to here discuss these subjects.

There follows a classified subject index.

It classifies, by number, the subjects discussed, and designates the Brief pages where stated, and the pages where they are discussed.

The classified index is, therefore, a ready reference

to each point, and to the authorities supporting the same. Our table of Cases, Statutes, Constitutional provisions and Text Books cited, gives page reference to the citations.

We hope that the Court will carefully examine the classified subject index, before concluding that the length of the brief will increase the Court's burdens.

And with the thought that it will be of valuable assistance, we respectfully submit it in the following pages:

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SUBJECT CLASSIFICATION

Under this we classify the numbered points or paragraphs in the Brief, and upon the respective subjects, and at the chapters and Brief pages shown below.

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Hence, when the power company purchased the lands they had no riparian rights accompanying them.

Therefore, the decision that the legislature had by definition defined a vested riparian right, to be only such as had been used before the enactment, (its 181), and the decision (at its 182), that the power company had by such definition lost its right to the continu-

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In the Supreme Court of the United States

OCTOBER TERM, 1934

NO. 612

THE CALIFORNIA OREGON POWER COMPANY, a Corporation,

Petitioner,

vs.

BEAVER PORTLAND CEMENT COMPANY, a Corporation, and CITY OF GOLD HILL, OREGON, a Municipal Corporation,

Respondents.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

To the Honorable, the Supreme Court of the United States:

JURISDICTIONAL AND OTHER REFERENCES

CHAPTER I.

(b) This suit was instituted in the District Court for Oregon, and final decree entered therein, March 11, 1932, (R. 78-9). The Bill of Complaint alleged diversity of citizenship as the sole ground for federal jurisdiction. The opinion has not been reported. (It is at R. 50-66).

The cause was appealed to the United States Circuit

Court of Appeals for the Ninth Circuit. The opinion is reported at 73 F. (2d) 555.

(c) The grounds on which the jurisdiction of this court is invoked are as follows:

The original jurisdiction having been obtained solely upon the ground of diversity of citizenship, and the Court of Appeals having taken jurisdiction of the cause solely upon that ground, (although Federal constitutional questions had been raised after the cause was begun), and said judgment and decree of the Court of Appeals being final, and not appealable, the same was, and is reviewable at the discretion of this Court, upon Certiorari. The jurisdiction of the Appellate Court having been based upon the ground of diverse citizenship, and it having had the entire record before it, and having considered the case upon its merits, and having disposed of the entire matter by final decree, the cause may be fully considered and disposed of here.

1. The date of the judgment to be reviewed is November 5, 1934, (R. 479). It affirmed the judgment and decree of the District Court, found at R. 78-9.

2. The specific claims advanced and rulings made in the lower court which are relied upon as a basis for this Court's jurisdiction are:

Petitioner's Bill of Complaint was filed in the District Court July 26, 1930 (R. 16), and alleged diversity of citizenship of the parties as the sole basis for federal jurisdiction. The Bill alleged petitioner's riparian rights in its said lands described therein; that these

lands border on Rogue River in the district, and extend under the waters of the river to the thread thereof. That respondents' lands lie across the river therefrom, and upon the opposite bank thereof. They extend under the waters of said river to the thread thereof, (admitted in the pleadings); that just prior to the filing of the suit respondent Cement Company had exploded large quantities of dynamite in the bed of said river on its side of the stream near the thread. That the resulting explosions had shattered the rock bed of the river for a distance of 100 feet up and down said stream, with an approximate width of 27 feet, and for a depth of six feet below the low water mark of said river, and the rubble resulting from such explosions lies in the bed of said stream. That it was the purpose of the respondent Cement Company to remove the same, and they were engaged in so removing it when enjoined, and, except for the injunction, would have removed the same. (Alleged in the Complaint, paragraph XII, R. 24-5, and admitted in the Answer, paragraph XVIII, R. 37-38). The testimony showed the length of the channel so to be opened was 200 feet up and down said stream, by 30 feet wide, to a depth of six feet below the water level (Appx. 99-100, quoting R. 116); that the amount of water in addition to that naturally flowing there, and so to be drawn in the said new channel, was 1347 second-feet, according to the Cement Company's official in charge of the blasting operations, (Appx. 124-5, quoting R. 112 and 114.) This is

more than twice the flow of the stream at low water.

The Cement Company intended that when its contemplated plan was carried out, it would leave on petitioner's land 122 cubic feet per second of water, which Cement Company said it was required to leave for a fishway, (Appx. 150-1, quoting R. 114). Such water so to be drawn through said new channel was to flow through the connecting canal, to Cement Company's contemplated power plant, and there dropped through turbines, (Appx. 139-140, quoting R. 111; Appx. 140-2, quoting R. 188-191; Appx. 143, quoting R. 199). Inasmuch as a way for fish is required to be made around such plant, the water remaining upon petitioner's land must then be so used for such fishway.

Petitioner contends that the result of the decree of the Appellate Court is to dissolve the existing injunction, permit the removal of the rock shattered by the explosions, creating a depression in said stream bed into which said waters of the stream would be naturally drawn from petitioner's lands, to its permanent injury.

Respondents' answer alleged the existence of uncompleted State Engineer's permits, as its rights for such dynamiting of said river bed, and the removal therefrom of the rock shattered by the said explosions (Answer XI, R. 33-4; XVIII, 37-8). Said permits were issued under the Oregon 1909 Water Code, set forth in full at Appendix 1-33.

In 1924 the Oregon Court in Re Water Rights of Hood River (cited) determined that Subdivision 2 of

Section 70 of said Water Code (Appx. 29-30), destroyed all vested riparian rights in such streams which had not, prior to the enactment of the Code, been put to a beneficial use. And the Appellate Court adopted that construction of Subdivision 2 of said Section 70, holding in effect that petitioner's said common law rights in said stream and channel thereof, were destroyed by the terms of said Water Code (R. 448, 450, 73 Fed. (2d) 568-9). Petitioner contends that said Subdivision 2 of said Section 70 is not unconstitutional when properly construed. But as construed here, as to petitioner's rights, it is violative of Section 1 of the 14th Amendment to the Federal Constitution, and the state thereby deprived the petitioner of its property without due process of law, and denied to it the "equal protection of the law." That it is contrary to the decision of this court in

Pacific Livestock Company vs. Lewis,
(1915). (Cited here, page 134),

so construing said Act, and with reference to said Subdivision 2 of said Section 70.

That it violates Section 4 of Article XI of the Oregon Constitution, forbidding the taking by any corporation of one's property without compensation, as said section was construed by the Oregon court in

Logan vs. Spaulding Lumber Company,
(February, 1921), (cited),

holding that the law permitting the impairment of such riparian right is violative thereof. That decision is con-

trolling and should have been followed below.

The Appellate Court in its opinion held that its said construction of said Subdivision 2 of Section 70 of the Water Code was within the power of the state in the exercise of its police power, on the ground that such construction regulated the use of the waters of said stream, and did not amount to a taking of the property; whereas, petitioner contends the result of the decree is to take petitioner's water rights without due process of law, or compensation, and to transfer the same to the respondents, which likewise violates said Section 1 of the 14th Amendment, in both of the particulars above specified.

Petitioner contends that the Appellate Court should have decided that the Desert Land Act of March 3rd, 1877, did not reserve to the United States riparian rights in the lands on non-navigable streams patented after the date of said Act, as construed by the Oregon court in *Hough vs. Porter,* (decided 1909), while holding that the doctrine of that case was unsound. Said question should have been definitely determined, and petitioner has the right to have such a federal statute, where material, passed upon by a federal court.

Petitioner maintains that the Appellate Court should have reversed said decree of said District Court, and required a decree to be entered therein, in accordance with the prayer of the petitioner's Bill, and making said injunction perpetual.

The acts complained of were enjoined in the District

Court July 26, 1930, (R. 17-18). The Decree of the District Court dissolved said injunction, (R. 78); denied petitioner any relief, and gave judgment against petitioner for costs (R. 79). It did enjoin respondents from drawing the water down below a certain level, which would leave, as respondents claim, about 122 second-feet, necessary for its fishway on petitioner's lands. (Appx. 151). Said quantity of water is worthless for power purposes for which alone petitioner's lands are valuable.

The injunction was contined during appeal to the Court of Appeals (R. 91). The decree of the Appellate Court affirmed the District Court, and dissolved the injunction against the blasting, removal of blasted rock, etc. (R. 479-480).

The mandate of the Appellate Court was by order thereof stayed pending action here on petition for Writ. (R. 480).

3. The statutory provisions under which such jurisdiction is invoked are:

Section 240, Judicial Code, (28 U. S. C. A., Section 347), providing the cases in which Certiorari to said Circuit Court of Appeals will be allowed. And Section 128 of the Judicial Code, amended, (Title 28, U.S.C.A., Section 225), providing for the review of final decisions by Circuit Courts of Appeal.

4. Petitioner cites the following cases believed to sustain the jurisdiction.

Mecanno vs. Wanamaker,
253 U. S. 136-142,
64 Law Ed. 822.

Petitioner refers to the portion of the opinion by Mr. Justice McReynolds at 253 U. S. 140.

Harriman vs. Northern Securities Company,
197 U. S. 244-299,
49 Law Ed. 739,

a decision by Mr. Chief Justice Fuller. We refer particularly to page 287 of 197 U. S., where it is held that the entire controversy may be disposed of on the merits here, the record having presented the whole case to the Court of Appeals in such manner that it might properly have been disposed of there, and the judgment is final.

Denver vs. New York Trust Company,
229 U. S. (S. C. Reporter's Edition) 123-145, at 133,
57 Law Ed. 1101,

a decision by Mr. Justice Van Devanter, construing Sections 240 and 128 of the Judicial Code to the effect that Certiorari lies to review the decree of the Appellate Court, where under Section 128 no appeal would lie, because this is a case in which the jurisdiction of the court of first instance depended entirely upon diverse citizenship. Hence, the jurisdiction of the Appellate Court likewise depended upon diverse citizenship precluding an appeal.

Friend vs. Talcott,
228 U. S. 27, at 36.
57 Law Ed. 718,
(as to the application of the police power—not urged below).

STATEMENT OF THE CASE.

CHAPTER II:

This cause is here on Certiorari to the Circuit Court of Appeals for the Ninth Circuit, to which it had been appealed from the District Court at Portland, Oregon.

The suit was instituted to prevent confiscation of petitioner's common law riparian rights in its lands bordering on Rogue River in southern Oregon.

The petitioner is a public utility, with powers of eminent domain, resident in California, and engaged in the distribution of electric power in northern California and southern Oregon.

The respondent City is a municipality of Oregon, with a population of about 600.

The respondent Cement Company is an Oregon private corporation, engaged in the manufacture of cement at respondent City.

It is the party in interest here, having acquired the city's rights by appropriation in Rogue River, (and certain permits issued by the State Engineer of Oregon)—by a contract of purchase under which about half the purchase price has been paid. The contract is Exhibit "A" to respondents' Answer. (Answer at R. 20-38. Exhibit A thereto R. 38-46). As will be shown, this situation makes the Cement Company the owner of the property and leaves the City the holder of the legal title, as security for the balance of the purchase price.

CHAPTER II

Petitioner's lands are riparian to Rogue River, lie along the east bank thereof, and extend under the water to the thread of the stream, where their western boundary becomes the eastern boundary of the riparian lands of respondents.

Respondents' lands, therefore, lie along the west bank of the stream, extend under the river to the thread, and are opposite the lands of the petitioner. The stream flows south at this point. (Paragraph V, of the Bill of Complaint, (R. 7-8) sets forth provisions of the decree of December 20th, 1929, between the same parties over the same lands. Said paragraph V of the Bill of Complaint is admitted by the Answer of respondents, Paragraph VI (R. 23). Respondents' Answer, paragraph X (R. 10), alleges that petitioner's said lands, and respondents' lands lie along said stream, as stated above.

> By an Act of Congress of May 18th, 1796, still in force, it is provided that,
>
> "In all cases where the opposite banks of any stream, not navigable, belong to different persons, the stream and the bed thereof shall be common to both."
>
> (Citation and discussion of the Act embodied in the Brief, at pages 269-70).

Petitioner maintains that said statute, being in effect when the lands of the respective parties were patented, vested such rights in said lands. Particularly so, because on its admission, the state adopted the doctrine of common law riparian rights, and administered the

same in all cases until the issuance of petitioner's patent, and for many years thereafter. And especially since the Oregon Court, during all of said period, consistently protected by injunction, the beds and banks of non-navigable streams, to preserve inviolate the common law riparian water rights of the proprietors of lands bordering thereon.

Ever since March 11th, 1921, petitioner has been and is the owner of its said lands. (Bill of Complaint, paragraph IV, R. 7). Admitted in respondents' Answer, Paragraph VI, (R. 23). Petitioner acquired its said lands, in order to construct and operate thereon, by the use of its riparian rights, a stand-by power plant for the manufacture of electrical energy. (R. 201-202) (Appx. 145). The necessity for such stand-by plants, and their uses, is explained in the testimony set forth in the Appendix, pages 143-145.

Briefly it may be said from the record:

That petitioner operates large hydro-electric power plants in the adjacent canyons and mountainous country, from which plants high voltage power lines are brought to the place of distribution of the power, and near petitioner's lands. These lines, passing through the mountain fastness, are liable to damage from storms and other causes, and the power transmitted thereby is liable to interruption. Therefore, the necessity for such stand-by plants does not arise until the use of power has justified the construction of these plants, and their long transmission lines. This comes after the utility

furnishing the power has assisted in the settlement and in the development of industry in the territory served, when it becomes necessary to distribute larger quantities of power to consumers. Hence, stand-by plants, properly stationed, as this would be, are necessary to the continuous service which the utility is required to maintain.

During the times herein mentioned, the Cement Company has been a substantial user of power furnished by the petitioner. And at the times with which we are concerned, it was seeking to construct its own plant for the manufacture of electrical power, on its lands opposite the lands of the petitioner, and to transmit said power to its cement mill, which adjoins the corporate limits of respondent City. (This is shown in respondents' Answer,—and the purpose of its operations complained of herein are explained by the Cement Company and set forth in the record, Appx. 149).

Prior to the sale of the City's property to the Cement Company (Exhibit "A" to the Answer) (R. 38-45), petitioner and the Cement Company were contenders for the purchase of the City's riparian lands and water rights. Petitioner offered $40,000.00, and the Cement Company $22,500.00 (R. 166). Petitioner offered to immediately begin the construction of its stand-by plant, which would have cost about $750,000.00 (R. 187). The City, upon a vote, accepted the Cement Company's offer, and declined that of petitioner. (R. 167).

Two suits prior to this one followed the sale of the

City's property to the Cement Company. The first was a suit in the name of the City, instituted and conducted by the Cement Company, to condemn nine acres of petitioner's said Lot 1, for the purpose of enabling the Cement Company to place thereon the eastern end of its proposed dam for the diversion of the waters of the stream to the respondent's west side thereof, for *power* purposes. It was begun October 20, 1926, and went to final judgment in *petitioner's* favor June 13, 1928.

Notwithstanding the result of said condemnation action, and the verdict of the jury for petitioner, the Cement Company began to build a cement structure on the same portion of petitioner's said land, for the same purposes.

The petitioner enjoined said work in the Federal District Court at Portland, Cause E-8991, in which suit the respondents were defendants. That case was decided by the Court of Appeals in 1929. (Reported at 35 F. (2d) 317). (In that court it was Number 5806). It began September 13th, 1928, three months after the determination of the condemnation suit. The decree of December 20, 1929, permanently enjoined this work. The respondents had based their claim upon an abandoned easement, growing out of a former suit.

The stipulation of the parties here, reciting the dates of the beginning and determination of said suits, is Plaintiff's (Petitioner's) Exhibit 30 (R. 356-7).

July 26, 1930, petitioner instituted this suit. (R. 356, 357). It was brought to prevent further dynamiting

of the river bed and further removal of the rock shattered by the excavation, and to prevent the changing of the current of the stream, and withdrawing the water from petitioner's said property; likewise to establish the ownership and riparian character of petitioner's lands.

The former case had gone to decree, as stated, December 20th, 1929. (R. 172). In the opinion in that case the Court of Appeals had said that whatever may be the rule in Oregon touching riparian rights, the pleadings were inadequate and the time premature for a sweeping adjudication in respect to the relative rights of the parties. (35 Fed. (2d) 319). These respondents in that case had pled the ownership of the same rights by appropriation as they set forth in this case. Petitioner interpreted the portion of the opinion referred to, as intended to give to these respondents an opportunity to plead their riparian rights. For, so far as petitioner's rights were concerned, they were alleged to be the riparian rights belonging to its said land. The Oregon court had held, in a case cited here, that the allegation that the land bordered upon the meandered non-navigable stream, was sufficient to define its common law riparian rights.

It had been shown to the court of Appeals that a litigant could not claim in the same water suit, rights both by appropriation and by riparian proprietorship from the same stream. Hence, as we believed—the suggestion

that the pleadings were not ample for a full adjudication of the rights of the respective parties.

Apparently the Cement Company was unwilling to accept this opportunity, for it took no steps to settle or determined the controversy. It seemed to Petitioner that the Cement Company became impatient and attempted to substitute dynamite, for decrees. At any rate the dynamiting of the river bed occurred at about seven months following the entry of the modified decree in that case. The respondents were by said decree enjoined from further construction of its diversion works upon petitioner's said land. As we shall presently show, with record references, it intended by the dynamiting to cause the lowered channel to suck the water from petitioner's land into its power canal which it was deepening and widening, to make it carry more than twice the amount of water that flows in the river at low water in the ordinary season.

THE DYNAMITING

Mr. W. H. Muirhead, Vice President, and in charge of the Cement Company's operations, was responsible for the dynamiting. He testified that preparatory to the dynamiting, the Cement Company drilled holes in the bed of the river and inserted sticks or plugs therein (Appx. 120); that the drilling operations preparatory to the explosion of the dynamite were begun October 16th, 1928, and completed November 20th, 1928; that the drilling was completed about ten days *before*

the decision in said former case, then pending in the Court of Appeals. He said he was personally in charge of the dynamiting operations (R. 324-5, here, Appx. 122). He produced what petitioner's introduced as Plaintiff's Exhibit 4, a photo. (R. 119, Appx. 119).

PLAINTIFF'S EXHIBIT NO. 4

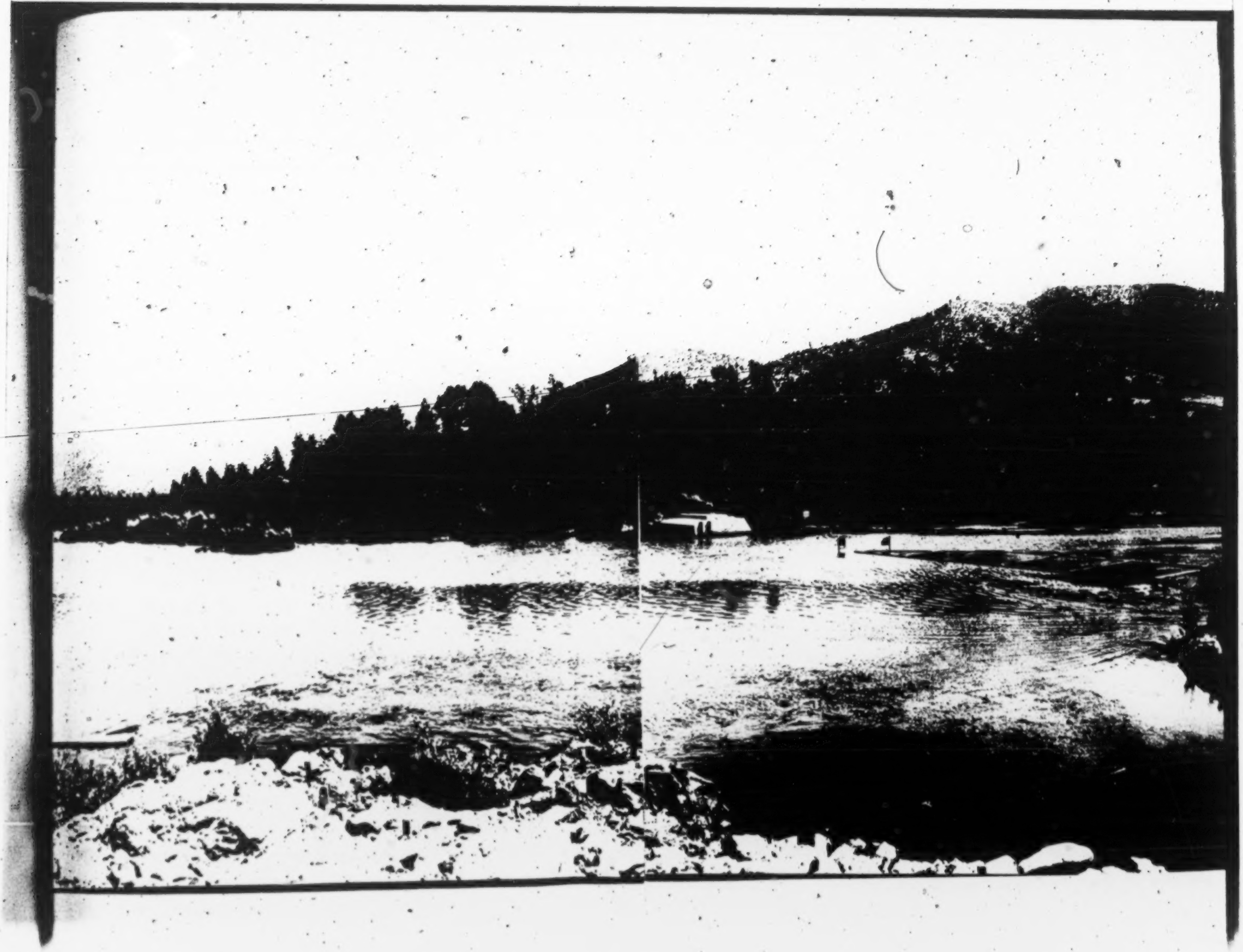
SHOWING AREA BEFORE BLASTING

Will the Court please turn to Plaintiff's Exhibit 4.

Mr. Muirhead testified that this Exhibit 4 was taken a couple of days before the blasting occurred; that it showed 220 holes from which wooden pegs protruded, these being the holes drilled to receive the dynamite. He pointed out on the exhibit the pegs showing the location of the holes (R. 118, here Appx. 119-120). It will be noted that arrows are shown pointing to some of these pegs, and that the pegs show that the drill holes are not only along the west border of the river, but are really well into the center of the stream, although all are on the west side of the thread thereof. In the distance to the left is seen a white cement pier, the further building of which was enjoined in said former decree of December 20th, 1929 (R. 172). This pier is on petitioner's land at the point sought to be condemned in the eminent domain suit mentioned.

RESULT OF THE BLASTING

At this point petitioner inserts Plaintiff's Exhibit 5, a print from a picture taken by the Cement Company three days after the explosion of the dynamite, to show the same area then, as was shown by Exhibit 4 (R. 122).



PLAINTIFF'S EXHIBIT NO. 5

AREA AFTER BLASTING

Mr. Muirhead testified that the two exhibits represented the condition before and after the blasting; that the dates on which the pictures were taken were: Exhibit 4, July 13th, 1930; Exhibit 5, July 24, 1930; and that the explosion occurred on July 21st, 1930. (R. 125, here Appx. 121).

If the Court will turn to Plaintiff's Exhibit 5, and compare it with Plaintiff's Exhibit 4, it will find that it is apparent that the blasting operations were successful, and highly so. The pile of rubble shown in the right half of Exhibit 5 has more the appearance of a wreck resulting from volcanic action, than from the work of man. At a glance the Court can see the results that would follow the removel of the rock shattered by the explosions from the 220 dynamite charges.

The Act of May 18th, 1796.

This was, of course, in conformity with the riparian doctrine that already existed. It was a part of an Act providing the system to be followed in the survey of the Northwest Territory.

It is true that in Oregon, as in most all of the states of the Union, riparian proprietors own to the thread of the non-navigable streams on which their lands border. So that the east boundary of the one tract, becomes the west boundary of the tract on the opposite side of the stream running south. Courts have said that this ownership is only for convenience and to avoid controversies. This is so, irrespective of the fact that the stream and

the bed thereof *are common* to both. Petitioner maintains that such a river bed is the way for the stream, and its use is common to the riparian proprietors whose lands are opposite. This federal statute is still in full force and effect. It has been cited by this Court, as we will show in the body of the brief.

Petitioner will contend and show that up to the time of the issuance of petitioner's patent in 1885, and for years afterwards, the Oregon Court has by injunction protected the beds and banks of the non-navigable streams at the application of the riparian owner. This is so because the common law riparian doctrine, which came to Oregon upon its admission to state-hood, and was adhered to up to the time of the passage of the Oregon Water Code (Appx. 1 to 33 inclusive), and afterwards, entitled the riparian proprietor to have the stream flow over and along his land at its usual height and in its natural channel, subject only to such changes as may be made by the reasonable riparian use of other riparian proprietors on the stream. This preservation of the stream and channel in its natural state is the outstanding element in a riparian right to the use of the waters of the stream. This right is part and parcel of the land, and can only be taken away by adverse use and possession, under a claim of right for the period of prescription—ten years, or by grant.

In its answer and at the trial the Cement Company attempted to justify the blasting of the river bed in order to apply the water for which it held State

Engineer's permits, numbered and set forth in its answer at paragraph XI, R. 33, paragraph XVIII, R. 37. It was admitted at the trial that the City's adjudicated rights, its own 220 second-feet, a part of which it used in its municipal plant, plus the McClure 75 second-feet (Appx. 147-148, quoting record), and quoting Boyle (undisputed) Appx. 147, R. 196-7), if transferred to the east side of the river, would all flow naturally into the City's plant, (the Cement Company's proposed plant site), without the dynamiting or the excavation of the rock shattered thereby; that the river in a state of nature naturally flows more than that quantity of water into the said power site, (295 second-feet).

The State Engineer's permits are the permits provided for in the Oregon 1909 Water Code. They are not the water right "certificates" provided for in Section 53 of the Water Code (Appx. 22). They are mere options to appropriate, or, as other courts have called them, "declarations of intention to appropriate" water from the stream. They were, as required by the Act, issued "subject to existing rights" (Water Code Section 1, Appx. 1). The permits were, therefore, subject to whatever of the petitioner's vested riparian rights were left after the enactment of the Water Code. We maintain they were not impaired by the Act. The Appellate Court, following the Hood River case, declared in effect that they do no longer exist.

The Water Code never purported to give the appro-

priator the right to enter upon the land of another to make an appropriation of water therefrom, and it has been so decided in the Oregon courts. Although the Water Code, Section 72, (Appx. 32) does give the right of *eminent domain* to acquire for public use any property or rights necessary for the application of water to a beneficial use, etc.

Petitioner urges that no State Engineer could have, under any statute, authority to issue permits justifying the acts complained of in this suit.

In the discussion that follows, we will make reference to several cases, the citations of which are:

In Re Willow Creek, 74 Or. 593;
144 Pac. 505; 146 Pac. 475; (Brief page 131).

Pacific Live Stock Co. v. Lewis,
241 U. S. 440; 60 L. ed. 1084; (Brief page 134).

Re Water Rights of Hood River,
114 Or. 112; 227 Pac. 1065; (Brief page 136).

In 1915, following the adoption of the Water Code, the Oregon court decided "In Re Willow Creek," cited and discussed below. This was the first of the adjudications considered in this court, in the case of *Pacific Livestock vs. Lewis.* In that case the constitutionality of the Act in some of its main features was assailed. Among the questions raised was whether or not the Act destroyed vested rights in violation of the "Due Process of Law" clause of the 14th Amendment. This court gave careful consideration to the opinion In Re

Willow Creek, and to the Act, read in the light of the Willow Creek decision.

Through the opinion in the Willow Creek case, the Oregon court announced: that the doctrine of prior appropriation and riparian rights is not so antagonistic that they may not both exist in the same locality; that every riparian proprietor is entitled, as against other riparian proprietors, to a reasonable use of the water of a non-navigable stream flowing through his land; that when riparian rights have become vested, they *cannot be taken away by legislative* enactment *nor judicial decree;* that the Water Code of 1909 called into requisition its police power only to a *limited extent;* that like all property, riparian rights are subject to *reasonable regulation.* It quoted previous Oregon decisions to the effect that the general doctrine of riparian rights was *too firmly established in the state* to now be shaken by judicial decision.

It quoted the Appellate Court, that the general doctrine of riparian rights was too firmly established in the state to be shaken now by judicial decision; that it was useless to cite authorities; that the riparian proprietor was entitled to the flow of the stream as long as it was of any beneficial use to him, *even to the flood waters,* etc. This, and other assurances, were put before this Court in *Pacific Livestock vs. Lewis,* a decision rendered in the October Term, 1915, closely following the Willow Creek decision.

And this Court gave due consideration thereto, and to the plain language of the Water Code in its Section 1, (that subject to existing rights, all of the waters of the state might be appropriated, etc; that nothing therein contained should be so construed as to take away the vested right of any person, etc.), and to Subdivision 1, of Section 70 thereof (Appx. 29), "that nothing in this Act contained shall impair the vested right of any person, association or corporation to the use of water," and held that the statute was not intended to take away or impair any vested right to any water or to its use, stating that this was expressly declared in its *first and its 70th Sections.*

In February, 1921 the Oregon Court held unconstitutional, as violating Section 4 of Article XI of the Oregon Constitution (cited), an Oregon statute which impaired a riparian right on a non-navigable stream, saying that it was a taking of property in proportion to the impairment of the riparian right. Petitioner acquired its lands after that decision; they had been patented in 1885.

There was the assurance in 1915 from the Willow Creek case that such rights were protected, and the decision of this Court, based upon the Willow Creek case, and upon the plain language of the statute itself, holding that the statute was not intended to impair any vested right to any water, or to its uses.

The Water Code had been in operation six years when these assurances were given. Nine years there-

after the Oregon court decided the Hood River case, and held that the Legislature had the right, (Subdivision 2 of Section 70), to destroy riparian rights, by *definition* of a vested right; that those vested riparian rights which had not been used prior to the enactment of the Code were destroyed. The construction, of course, is erroneous, because Subdivision 2 of Section 70 *does not declare* that those vested rights *which had not been put to a beneficial use,* at the enactment, were destroyed, but only that actual application of water to a beneficial use prior to the passage of the Act *shall be deemed to create* in such riparian proprietor a vested right.

Subdivision 8 of Section 70 declares:

> "All rights *granted* or *declared* by this Act shall be adjudicated and determined in the manner and by the tribunals as provided by this Act."

So that a proper construction of Section 70 seems to be that the Legislature intended to "create" in the riparian proprietor, who had used his right, a vested right, meaning thereby to convert it into an appropriation, as Subdivisions 3 shows, but to give it priority over other riparian rights.

And now, in the instant case, we have the decision of the Appellate Court, following the Hood River case, accepting the declaration that the common law riparian doctrine would "take the heart out of the Water Code," and make it difficult of administration.

And following the construction of In Re Hood River it holds that petitioner's vested rights were destroyed by the exercise of the police power of the state. And although petitioner's property has an undisputed value of $30,000.00 for power purposes,—the decision holds that petitioner is without damage.

Fishway.

The District Court enjoined the drawing down of the water of the river at the point in controversy below a certain surface water elevation. The testimony by the Cement Company was to the effect that this would leave on petitioner's property about 122 second-feet. The contour of the river bed being uneven, the amount could not, of course, be definitely ascertained.

The Vice President of the company, and in charge of its operations, held that this would leave sufficient water on petitioner's land for a "fishway." That this was all right, with the Cement Company, because he understood that the law required it to leave water for a fishway, (Appx. 151), (hence he was using petitioner's land therefor). Unfortunately, the Oregon law makes it a criminal offense to take *fish* from a fishway.

So that it appears that the excavation of the rock in the blasted area, in connection with the widening and the deepening of the canal, would permanently and totally destroy petitioner's land for any useful purpose whatever.

Cement Company Would Sell Power.

The Cement Company seeks to take this water from petitioner, for its own electrical plant. At times when the cement mill should not require all the power its plant would make,—it would sell power (Appx. 148-9). It purchases its power now from petitioner, the utility supplying the territory. It would compete with petitioner in a business not its own, *and which its charter does not permit,* it being a private corporation.

Mr. Justice Wilbur, presiding Judge, in the dissenting opinion here, expressed the view that such a construction of the Hood River case as is applied in the prevailing opinion, would result in the *taking* of petitioner's valuable property and turning it over to another without compensation, and that this could not be done without violating the Federal Constitution. He held that it amounted to a *taking* rather than a *regulation* of the riparian use.

We contend that as construed, the Water Code makes no pretense at the regulation of riparian rights. Its regulation is entirely of the use of the waters acquired through appropriation. By the terms of the Act, it seems not to have been even the intention of the Legislature to adjudicate riparian rights that had not been used at the enactment, (Subdivision 8 of Section 70).

Petitioner recognizes that the Cement Company, as a riparian proprietor, would have a right to make a reasonable use of the waters of the stream equal with

the right of the petitioner. But the Cement Company will have none of this. In the condemnation suit, the first of the series, it sought to condemn petitioner's property through the use of the city's name. In the second suit it sought to build a part of its dam thereon, under the pretense of using an abandoned easement. It refused to heed the suggestion of the Appellate Court that the pleadings were not adequate for the determination of the riparian rights between the parties. But instead of acting thereon, dynamited the river in an effort to take all of the water *without any authority whatever*, except the paper permits of a State Engineer, which had no property value or standing whatever. Certainly a court will not uphold the right to do this.

The Cement Company insists upon using upon its side of the stream not only the 220 second-feet admitted to belong to the City, but also the McClure 75 second-feet which the adjudication decree requires to be returned to the river on petitioner's side of the river, and *above* petitioner's land. It also insists upon so using, to the full extent thereof, the 1347 second-feet of water represented by the permits of the State Engineer. If it should be allowed to do this it follows that petitioner's riparian rights to the use of any of the waters of the stream will be destroyed.

With all due deference to the majority opinion, we are constrained to state that the Hood River case is

not in point in this case. The contest in that case, to which was applied the rule followed in the Appellate Court, arose between the claims of an upper appropriator of water for irrigation, and the power company's claim of riparian rights below. The opinion recites that the power company obtained its land from the State of Oregon; that when the state conveyed the lands to the power company's predecessors the law prevailing in Oregon authorized an appropriator, subject to existing rights at the time of his appropriation, to take the waters of the streams of the state for beneficial use, and convey them to non-riparian lands. (Paragraphs 26, 27; 114 Or. 181). The lands mentioned came to the state in 1859 on its admission to the Union. In the Act of Congress admitting the state there was the proposition to grant to the state Sections 16 and 36 of every township, and, if they had been acquired, other lands in lieu thereof, for the use of schools; 72 sections for State University, 10 entire sections for the purpose of completing public buildings, etc. These lands came to the state as they were and by grant. Of course, the state, as the proprietor of the land could denude it of riparian rights, if it had riparian rights, just as cases in this court (cited herein) held that the United States may while it is the proprietor of land define the terms of its grant. But if there is nothing to indicate otherwise, the entire property without reservation is conveyed.

The opinion at 183 states that it did not appear to

have been the intention of the power company earlier than the year 1883 to use any more water than it had diverted at that time.

The power company was in contest with upper appropriators, particularly Mt. Hood Water Company. (Opinion 150 and findings at 151). The Mt. Hood Water Company claimed under Mt. Hood Supply Company with priority of 1895 (Opinion 153).

So apparently according to these references the power company was claiming both as a riparian proprietor and as an appropriator. Apparently the power company's appropriation of 1883, showing no intention to use more water than diverted, left the field open under the doctrine of appropriation, to appropriate the surplus water remaining over the power company's appropriation. Apparently both were claiming as appropriators. True, the power company also claimed as a riparian proprietor. But it could not claim both ways in the same adjudication proceedings. The claims have been repeatedly held by the Oregon court to be inconsistent.

The Hood River case seems not only *not* in point, but to hardly bear a resemblance to the present controversy.

And it is said in the Hood River opinion that the power company recognized the rule that those obtaining title to the land take the same subject to the laws then prevailing. Of course, if the decision is put upon the ground that the state was the proprietor, and could

if it choose to do so, allow adverse appropriation to take the water from its lands, the opinion would seem "plausible," but not in point.

How different from this case. The owners of these riparian rights of the respective parties did not appropriate the water, they acquired the land; the lands being riparian to the stream carried with them as part and parcel thereof the riparian water rights. In this case the proprietor was the United States. It patented these lands to the patentee without any reservations whatever. And as this Court said in

Scott v. Lattig, (pages 270-1 hereof),

the court did not hesitate to say that Congress

> "intended to provide that the common law rules of riparian ownership should apply to lands bordering on non-navigable streams."

And it is said in

Kansas vs. Colorado, (pages 42-3 hereof),

the state on its admission could determine whether it would have the riparian right doctrine or the doctrine of appropriation applicable to the use of its waters. And as the state on its admission adopted the common law, and consistently applied to the lands patented thereafter the riparian doctrine, it seems the right in such lands was plainly a vested right. As to these no landed proprietor divested them of the riparian right. Is there any parallel at all between the two cases upon this point?

Strange to say in the Hood River case the court

decided that the power company was not entitled to an adjudication, as a riparian proprietor, that it had no riparian right whatever because it had not exercised its right prior to the enactment of the Code, (Op. page 182). If the state had denuded these lands of the riparian rights while it owned them, what is meant by the statement that it had not used these rights before the enactment of the Code? So we maintain that the Appellate Court is not justified in applying the doctrine of the Hood River case.

While the Hood River case was being thus decided, the same court had under consideration

Norwood vs. Eastern Oregon Land Company (1924) (here pages 130, 137),

commonly called the "Norwood case." In that case, which the majority opinion stated was decided at the same time as the Hood River case, the Oregon court held:

> "The title of the defendant, therefore, carried with it the common law riparian rights which have always been recognized in this state."

As the lands in question were patented prior to the passage of the Desert Land Act, the writer of the opinion in the Norwood case dodged the opinion in the Hood River case, holding that the lands did have riparian rights under the doctrine of *Hough vs. Porter*. But with the power company, whose rights came from the United States in 1859, on the admission of the state, it was different. It was not allowed an adjudica-

tion. So to have any consistency in the opinions at all, the Hood River opinion must have been put upon the ground of the state having been the proprietor, and this upper appropriation having grown up adversely, under the policy and doctrine of the state permitting such appropriations.

While in this case the petitioner is standing upon its vested riparian right, the respondent City has two small rights acquired under the doctrine of appropriation. These, petitioner has not disputed. One, the McClure right, was appropriated before petitioner's lands were patented, and the adjudication decree requires the water returned to the stream at a place above petitioner's land. It was a power right, operating a small quartz mill, so there was no loss by use.

As to the 220 second-feet of the City, the petitioner cheerfully concedes the right. It is more than sufficient for the City's municipal purposes. The water flows naturally into the little City power plant, which is to be the site of the Cement Company's plant. Petitioner has no contest with the City over that right.

But here we have no upper adverse appropriations in contest. In fact, we have no prior appropriations in contest. The depredations which the Cement Company committed in the river bed were to take the water from petitioner's lands under permits which are not property, which have no standing as property, but are mere licenses which may never be completed. Divergencies between the Hood River and the instant case be-

come wider and wider as we compare them. It has ever been the riparian doctrine that a riparian right is not gained by use, nor lost by misuse.

THE POLICE POWER

Petitioner freely admits that property of all classes must bow to the superior authority of the state for public good. But that does not mean that property can be confiscated for public good. It means only that the state may regulate its use if that be necessary, or if the state must have it, it may condemn it and pay for it.

As was aptly stated in the dissenting opinion:

> "If then these two adjoining owners are entitled to the entire flow of the stream as it actually reaches their land for the purpose of generating power thereon, can the state legislature take the right of one owner to a part of this power and confer it upon the other in the exercise of the police power of the state? The proposition thus stated carries its own answer, for it has always been held that a state cannot in the alleged exercise of its police power take the property of one person and confer it upon another. As stated by the Supreme Court of North Carolina in *Lowe vs. Harris,* 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379:
>
> 'No law which divests property out of one person and vests it in another for his own private purposes without the consent of the owner, has ever been held a constitutional exercise of legislative power in any state of the union', citing *Cooley Const. Lim.* 165; *Wilkinson v. Leland,* 27 U. S. (2 Pet.) 658, 7 L. Ed. 553;" (R. 467) (Here follows a long citation of authorities).

In the dissenting opinion Mr. Justice Wilbur offer-

ed a solution of great merit, and one worthy of consideration.

We quote from the dissenting opinion, 73 F. (2d) 576-7 (R. 477-8):

> "It follows that a full recognition of the common law riparian right to full and continuous flow would destroy the right. Here is a legitimate field for the exercise of the police power of the state to give to the owner desiring to utilize his power the right to make the necessary changes on his land to do so. On the other hand, the rights of the appellant should be fully protected. This can be accomplished, I think, by granting an injunction unless the appellees shall file a disclaimer to more than one-half of the flow of the stream, after the deduction of the flow of 220 second feet to which it has an acknowledged priority, and an agreement to pay a reasonable sum for the use of all water above one-half of the remaining flow of the stream after deduction of 220 second-feet, said amount to be fixed by the court, and payable monthly for such power so used for the previous month, the appellees to have the right to use the full flow of 1,347 second-feet if the water level of 1,070 feet permits until such time as the appellant is ready to utilize its one-half of the flow of the stream, less 220 feet."

A decree to be worked out upon this line should restrain destruction of the river bed. Nature divided the water practically equally, by the reefs, some of which would have been destroyed except for the injunction. It would cost a considerable sum to restore the bed, following the excavation of the shattered material. And, the shattered area being on the cement company's side of

the thread, would make complications in any effort to restore the bed.

The decree should restrain the use of permits for the taking of petitioner's portion of the water. Respondents have ample protection in the riparian right.

SPECIFICATION OF ERRORS

Petitioner specifies the following errors in the decision of the Appellate Court, and upon which it relies:

1. The decision violates Section 4 of Article XI of the Oregon Constitution, as construed by the Oregon Supreme Court, June 15th, 1920, which decision should have been followed.

2. The decision violates the "Due Process of Law" clause of the 14th Amendment to the Federal Constitution, in the taking of private property without due process of law.

3. It violates the "Equal Protection of the Laws" clause of the 14th Amendment in this:

It *especially preserves* rights of riparian owners who had used their rights for beneficial purposes before the enactment of the Water Code of 1909, *but denies this same privilege to all who* had *not* so used theirs, and in which class petitioner is.

4. The Appellate Court erred in not construing the Federal Act of March 3rd, 1877, known as the "Desert Land Act," because the Oregon Court had construed it as destroying riparian rights in lands patented after

its enactment. Petitioner is entitled to have that question passed upon by the Federal Court.

5. The Appellate Court erred in not reversing the judgment of the District Court, and decreeing an injunction protecting the channel of Rogue River from further blasting or removal of rock already blasted therein.

6. And in failing to decree that petitioner's riparian rights were unaffected by the Desert Land Act, or by Chapter 216 of the laws of 1909.

7. It erred in holding that *Section* 70 of the Oregon Water Code of 1909 was an exercise of the police power, *regulating* petitioners' riparian rights, whereas, as construed it took and confiscated the same. The Court erred in not construing said *Section* 70 of the Water Code in accordance with the decision of this Court, *directly construing the same as not impairing vested rights.*

SUMMARY PRECEDING ARGUMENT

CHAPTER III.

In support of petitioner's Specification of Errors 1, 2, 3, 5, 6, and 7, the petitioner makes the following points:

(1) That at the time of the issuance of petitioner's patent to its lands, the common law riparian doctrine prevailed in Oregon, and that such patent carried with it such riparian rights to Rogue River. That such rights relate back to the date of settlement and entry of said lands. That these rights abide in the land, and belong to the owner thereof, until he is deprived of the same by grant, adverse use, or some other legal means. That after the date of such entry no appropriation of the waters of said stream can be made which will invade such riparian rights.

In support thereof, we submit the following:

ON ADMISSION, STATE MAY ADOPT OR REJECT COMMON LAW RIPARIAN DOCTRINE

When a state is admitted into the Union, it may determine for itself whether or not it will adopt the common-law doctrine of riparian rights.

Kansas v. Colorado, 206 U. S., pages 46-118, 27 Sup. Ct. 655, 51 L. Ed. 956.

We quote from 206 U. S. at 94-5, as follows:

"It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the *arid regions of the West* of the appropriation of waters for the *purposes of irrigation shall control.* Congress cannot enforce either rule upon any state."

(A further quotation from this case on this point is at Appx. 45).

THE COMMON LAW ADOPTED ON ADMISSION OF OREGON

Speaking of the common law in Oregon, Mr. Justice Gray in

Shively v. Bowlby, 152 U. S. 1, 52 (38 L. Ed. 331, 350), 152 U. S. at 52,

said:

"The settlers of Oregon, like the colonists of the Atlantic States, coming from a country in which the common law prevailed to one that had no organized government, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefore, is based on the common law."

The foregoing decision was rendered in this court at the October term, 1893. In error, to the Supreme Court of Oregon, to review the judgment of that court, affirming a judgment of the Circuit Court of Clatsop County, Oregon, in equity, brought by Bowlby against Shively, to quiet the title to lands below high-water mark in the City of Astoria. The judgment dismissed

the claim of the defendants under a patent from the United States to the title to the lands, and then on motion of the plaintiff, dismissed the suit, without prejudice. The case below is reported in 22 Oregon at page 410. It was affirmed here.

See also:

United States F. & G. Co. v. Bramwell, 108 Or., pages 261-289. *July* 10, 1923 (217 Pac. 332).

Quotation from pages 264-266:

"The common law of England, modified and amended by English statutes, as it existed at the time of the American Revolution, as far as it was general and not local in its nature and applicable to the conditions of the people and not incompatible with the nature of our political institutions or in conflict with the Constitution and laws of the United States or of this State, except as modified, changed or repealed by our own statutes, has been adopted and is in force in this state: *Perry v. Fletcher,* 93 Or. 43 (182 Pac. 143).

By Section 2, Article 1 of the Organic Law of the provisional government of Oregon, adopted by the vote of the people on July 26, 1845, it was declared that:

> 'The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings, according to the course of common law.' * * * * *

"Section 7, Article XVIII of the Constitution, adopted by the people on September 18, 1857, provides that 'All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until *altered or repealed*'."

In

Fidelity, etc., Co. v. State Bank of Portland, 117 Or. 1, 5. *January* 19, 1926, (242 Pac. 823),

Quotation from page 5:

> *"It is our understanding that we are as much bound by the applicable rules of the common law, where such rules have not been modified, or abrogated by statute, as we are by the statutes themselves."*

OREGON CASES DECIDED PRIOR TO THE ISSUANCE OF PETITIONER'S PATENT

These cases early decided that the common law riparian doctrine was applicable to the conditions prevailing in Oregon, and applied the same, thereby supplementing and applying the constitutional provisions quoted.

We cite:

James Taylor v. James Welch, 6th Or. 199, (decided at the December term, 1876-7, pages 200-201.

This was an equity suit for an injunction and damages. The plaintiff alleged the ownership of the land upon which he resided, and that a spring branch creek had, from time immemorial, flowed through the same and furnished his water supply; that the stream was made by a spring pond or swale above plaintiff's land and on the lands of the defendants; that the defendants had dug, and were continuing to open an artificial channel from said pond or swale, so as to divert the

water from plaintiff's premises, and to convert the same to their own use, to plaintiff's injury. These allegations were put in issue.

The court held that the plaintiff had not satisfactorily established the facts as to the prior existence of a well defined stream, etc. However, the court stated the rules of law applicable. It said, in substance, that the rules of law are well settled; that every proprietor of land through which flows a stream of water, has a right to the use of the water flowing in its natural channel, without diminution or obstruction, citing Washburn on easements, 215, but that the rule does not apply to percolating water. (Further quotation from the opinion, Appx. 48).

Shively et al v. Hume et al, 10 Or. 76 (1881) applied the doctrine of *Taylor v: Welch,* to the effect that the proprietor of the land through which a stream of water flowed

> "has a right to the use of the water flowing in its natural channel, without diminution or obstruction, and that this was equally true of water which flows in a well defined and constant stream in a subterranean channel."

The stream involved in this suit was determined to be a natural water-course flowing across the corner of plaintiff's land. The court held that the defendants had diverted that water from its natural course, and that the plaintiff was entitled *to injunctive relief* against the diversion, basing the decision upon the riparian

doctrine announced in *Taylor v. Welch:* We cite it further under the heading "Injunctive Relief."

Hayden vs. Long, 8th Ore., 245. (1880).

This was an action for the abatement of a nuisance and for damages.

Plaintiff alleged that he was the owner of certain real property, on which he had a machine shop and reservoir or pond of water, and that the same was continually used by him for water power in the manufacture of machinery, furniture and wagons; that the pond and water power were fed by a small stream, which the defendant wrongfully diverted from its natural and usual channel by unlawfully tapping the same above plaintiff's land and taking the water across to other lands by artificial ditches, to plaintiff's loss; that large quantities of water were constantly washed into plaintiff's pond, "to the nuisance of the said machine shop, water power, and land, and to his damage in the sum of $75.00."

The court held that the plaintiff (appellant),

> "being a riparian owner, was entitled to have the water run through his place, undiminished by the use of anyone, except such as own the land adjoining the stream above his land." (From page 247).

We direct the Court's attention to

> *Shaw vs. Oswego Iron Works,* 10 Ore. 375-6 (1881).

This suit, brought and determined prior to the issuance of petitioner's patent, was a suit to enjoin the de-

fendant from diverting the water of the Tualatin River from its *natural channel* into Sucker Lake, to be used for manufacturing purposes. Plaintiff Shaw alleged that he was the owner in fee simple of land lying at and near the confluence of the Willamette and Tualatin Rivers, at which point there was sufficient fall in the Tualatin at all seasons to propel a large flouring and saw-mill, and other machinery; that said waters can be diverted on and over said land at little trouble and expense, and by such diversion form a "*water privilege* and power of great value" and that the use of the water is now of *great prospective value* as a motive power to the plaintiff as the riparian owner of the land. That the defendant had commenced to construct a channel from said stream to divert the waters thereof from the natural channel, at a point about five miles above the plaintiff's land, and to turn said water into Sucker Lake, so that it will not again flow into the Tualatin; that *defendant has already cut and dug* such channel to such a depth so as to divert a large portion of said water to flow from the Tualatin into said lake, and threatens to make said canal deeper and wider, so as to divert more of said waters from their natural channel into said lake. That if permitted to do so, he will divert the same, to the great and irreparable injury of the plaintiff, and should be restrained.

The defendant sought to prevent the injunction, and to defend on the ground that the stream was a public navigable stream, and entirely in Oregon, which raised

the question whether the Tualatin was a public navigable stream. If so, it was conceded that the bed is *owned by the state,* and that the plaintiff's suit based on riparian ownership "ad medium filum aquae," *must fail* (Ore. Report 371-373). The court held that certain classes of streams mentioned are called navigable, in which the sovereign is the owner of the subjacent soil, and all right belongs exclusively to the public. *But that such streams as are non-navigable for any purpose* are in no way public highways, and that they are altogether *private* property.

The case held that streams that are capable of floating logs for *certain periods* of the year are navigable for that purpose, and subject to that use. But the court said that there is not a suggestion "that the *bed of such streams* is owned by the state." It held that the law recognized the right of a riparian owner to the middle of the stream, subject to the public servitude for log floating, and enjoining the defendant from diverting the stream from its channel. A quotation from this case, upon these subjects is set forth in Appx. 49,

Morgan vs. Shaw, 47 Ore., 333, (83 Pac, 534). Decided by the Oregon Court, May, 1884.

It is valuable here as it was decided prior to the issuance of petitioner's patent. It deals with the doctrine of riparian rights, as modified by the doctrine of *prior* appropriation.

We quote from it:—

Morgan vs. Shaw, 47 Orc. 333, (83 Pac. 534).

Quotation is from page 337:

> "3. Much importance seems to be placed by defendant upon the averment in his answer that he diverted water from a stream at a point on the public domain; and that as the plaintiff failed to allege such fact in the complaint, he, having given evidence thereof at the trial, had established the better right. *This contention is without merit,* for where, as in this State, the common-law doctrine of riparian rights, as modified by the rule of *prior* appropriation, is recognized, it follows that, as Dr. Stevens was a prior settler on public land through his title to the premises secured from the United States *related back* to the date of his settlement, which the Middle Fork of Burnt River flowed, and that stream was not flowing through public lands when the defendant made his diversion: *Brown v. Baker,* 39 Or. 66 (65 Pac. 799, 66 Pac. 193)."

The Weiss case was decided the year following the issuance of petitioner's patent. The case is

Weiss vs. Oregon Iron & Steel Company, 13 Orc., 496, 11 Pacific 255 (1886).

It is particularly valuable for these reasons:

That while the decision was rendered June 6th, 1886, the year following the issuance of petitioner's patent, yet it was dealing with lands that had been entered and patented long prior thereto. The case presents a thorough review of the common law riparian doctrine in Oregon, as the same was applied by the Oregon court, from the beginning of state-hood to the issuance of petitioner's patent, and from that date to the decision

of *Hough vs. Porter,* decided in installments; some in January, 1909, at the time of the convening of the Legislature, which passed the Water Code, and some in June, 1909, following the adjournment of the session.

The case is also valuable here because it has been many times cited in the Oregon court, as announcing the prevailing riparian doctrine. It was followed with full application of the common law riparian doctrine in the Harris case, decided in 1928, nearly four years *after* the decision in Re Hood River, and the decision in the Norwood case.

In this period there was, of course, applied the doctrine of appropriation, arising out of the Acts of Congress, and the customs of the settlers, principally miners. But the right to appropriate waters passing through riparian lands was always held to be cut off by the entry of the lands for settlement, if they were subsequently patented to the entryman. And such rights of appropriation were only held to be superior to the riparian rights of the riparian owner, when the appropriator had, by adverse possession for the period of prescription, taken the water from the riparian owner or entryman. From such adverse use arose the expression "riparian doctrine, as modified by the doctrine of *prior* appropriation." But the Oregon court had never held that an appropriator could enter upon the lands of the riparian owner to make an appropriation, nor deprive a riparian owner of the flow of the water through his

lands, except by such adverse use for the period of prescription, ten years.

The Weiss case was a suit by the plaintiff to enjoin the defendant from diverting the waters of the Tualatin River into Snake Lake for manufacturing purposes. The plaintiff alleged that he was the owner of land abutting upon Tualatin River, the southern boundary thereof, for about three-fourths of a mile from its confluence with the Willamette River, and, therefore, is the *owner of half* of the *river bed*, and entitled to have the waters of the river flow in their accustomed channel. Defendant denied this, and contended that the official survey and patent to the plaintiff's land did not include nor establish the claim of the plaintiff. The court held upon the evidence, that plaintiff's title was not doubtful nor difficult of ascertainment.

The Harris case (*Harris vs. Southeast Lumber Co.*), is discussed in connection with the Weiss case at Appx. 73-4. And it is quoted at length at Appx. 74-5-6, where it quotes the language of the doctrine of riparian rights, as announced in *Weiss vs. Iron Works supra.*

The Weiss case, at page 498, recites that one-fifth, and perhaps more, of the Tualatin is diverted from its course, and turned away from the other riparian owners; that the case differs essentially from a case in which the stream is diverted for manufacturing purposes, and the excess of water not actually consumed, is

restored; that it is a case of diversion of a part of the water course, not for ordinary purposes, but for manufacturing purposes, but, without restoring it to the channel. It then announces the riparian doctrine substantially as follows:

The owner has no property in the water, but a simple usufruct; he may use it as it passes along, but he must send down to his neighbor below as much as he has received from the neighbor above, citing Angell on Water Courses, Sections 90, 94, to the effect that as a general proposition every riparian proprietor has a natural and equal right to the use of the water in the adjacent stream to his land, without diminution or alteration, citing Washburn on Easements, 319; that, (quoting),

> "Riparian proprietors are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands, flow as it is wont by nature, without material diminution or alteration." (Gould on Waters, 204).

It then quotes Chancellor Kent, to the effect that though the riparian owner may use the water as it passes over his land, he cannot unreasonably detain it, or give it *another direction*, and must return it to its ordinary channel when it leaves his estate; that *without the consent of the adjoining proprietor* he cannot divert or diminish the quantity of water which would otherwise flow to proprietors below.

The opinion holds that a right to a water course be-

gins *ex jure naturae,* and having taken a certain course naturally, it cannot be diverted to the deprivation of the rights of the riparian owner below. It says this is the language of the common law text books, and the decisions, citing Angell on Water Courses, Section 93. It quotes Weston, J., in *Blanchard vs. Baker,* 8 Greenl. 266, that RUNNING WATER *is not susceptible of an appropriation* which will justify the diversion or unreasonable detention of it. It quotes Lord Ellenborough in *Bealy vs. Shaw,* 6 East. 208, 214, that the general rule of law is that every man has the right of the advantage of the flow of water in his own land without diminution or alteration. It quotes the Supreme Court of California, in *Pope vs. Kinman,* 54 Cal. 3, to this effect:

That by settled principles of both civil and common law, the riparian owner has a usufruct in the stream as it passes over his lands, *of which he cannot be deprived by mere diversion.* The author continues with further citations, Opinion 499.

The opinion then holds that the riparian owner has the right to reasonable use of the stream, without diminution or waste; he is entitled to use only so much as will not materially diminish its quantity, and may use it for *any legal purpose,* providing he returns the stream to its channel, uncorrupted, and without essential loss.

It holds that all authorities concur, that when

the amount abstracted . perceptibly or materially diminishes the quantity of the stream, such use by a riparian owner, *is unreasonable, and an infringement* on the other riparian owners, for which *the law furnishes redress,* Opinion 500.

It holds that the plaintiff in that case was entitled to have the natural flow of the stream *in its accustomed channel,* subject only to diminution and retardation incident to the usual use, and that whatever goes beyond this is an infringement of his rights in the stream, which may *form* the basis of a *presumption of grant by lapse of time,* and necessarily *imports damages,* and *entitles him to the protection of the law.* In other words, to an injunction, Opinion 500.

The opinion stated that counsel for the defendant, while admitting the rule of common law as to riparian owners is fatal to the defendant's claim, insisted that the rule needed to be *liberalized, and that the case presented a forceful illustration of the hardship and injustice of its operation.* Hence, it was the duty of the court to so extend and liberalize it, as to protect the defendant from the unjust consequences of its application. But the court quoted Black J., in *Wheatley vs. Chrisman,* that:

> "The necessities of one man's business cannot be the standard of another's rights in a thing that belongs to *both.*"

Because of the importance of the Weiss case in a con-

sideration of the law of this case we have quoted in the Appendix, (from the Oregon Report at pages 498-9-500 and 501), and upon the subject of "injunction" from 503. (Appx. 52-56) (In all quotations the italics and capitals are always ours, unless otherwise indicated).

Heretofore we have said that the riparian right enters the land upon the date of the issuance of the patent. This is correct except that the patent relates back to the actual entry of the settler upon the land, and cuts off future appropriations of water belonging to the lands because of their riparian character.

The leading case in Oregon upon the subject of relation back to the date of land entry is

Larsen vs. Oregon Railway & Navigation Co., 19th Ore. 240 (1890). (23 Pac. 974).

In this case the defendant Railroad Company wrongly entered upon plaintiff's land for the construction of a railroad across the same, and the plaintiff sought an injunction. The answer denied the allegations of the complaint, except that it admitted that it built and operated its road on said premises.

By way of separate defense it alleged that on the 1st of May, 1888, the land was *public land* of the United States; that pursuant to the Act approved March 3, 1875 granting a right of way over public lands, the defendant duly acquired a right of way over said lands for its railroad (using the terms of the grant to establish the acquisition of the right of way). Opinion 242.

The court said that it appeared from the bill of exceptions that the plaintiff settled on the land in controversy as a homestead in the month of December, 1886, or January, 1887, and in February, 1887, made the necessary filing in the Land Office, showing such settlement and claim. (Opinion 246).

That inasmuch as no patent had been issued and plaintiff's right was still possessory, the five years not having expired from the date of the commencement of the entry, the railroad company *claimed* that at the time of its entry the land was public land, leaving the power to Congress to dispose of it as it might think fit, citing the "*Yosemite Valley Case*, 15 Wall, 77, and *Frisbie vs. Whitney*, 9 Wall, 189."

The court held as follows: (page 246):

> "Such settlement and compliance with the act *severs* the land claimed as a homestead from the mass of public lands, and it is taken out of the act of congress of March 3, supra. This is the effect of the doctrine of *Wilcox v. Jackson*, 13 Peters, 498, and *Hastings & D. R. R. Co. v. Whitney*, 132 U. S. 357; and such is the construction given to this act in *Red River L. R. R. Co. vs. Sture*, 32 Minn. 95."

This case is followed in *Faull vs. Cooke* and *Brown vs. Baker*, two early Oregon cases, quoted below.

Faull v. Cooke, 19 Or. 455
(26 Pac. 662) (1890),

Was decided in the same term as the Larsen case. After the announcement of the opinion in the Larsen case, and while *Faull v. Cooke* was under consideration,

this court decided *Sturr v. Beck*, quoted at Appx. 57-9, and cited below. The latter case came to the attention of the Oregon court while it was considering *Faull v. Cooke*, and the court cited it, and held that it conclusively settled the legal questions in *Faull v. Cooke* against the appellant therein, and to the effect that a homestead claimant's riparian rights attached from the date of his settlement, and that when he complied with the law and got his patent, it related back to the date of the settlement and cut off, as of that date, the opportunity to make an appropriation that would deprive the homesteader of his riparian rights.

In *Faull vs. Cooke*, the plaintiff, Faull, alleged that in the year 1877 his grantors constructed a ditch out of Conner Creek, a natural water course in Eastern Oregon (Baker County) taking the same through the unoccupied public lands to a point known as Douglas Gulch, which emptied into Snake River, in said county; that the same was for the purpose of mining in said gulch, and for the sale of water to other miners, and to ranchers and farmers for irrigation; that at the date of said construction his grantors were the owners of all the ditches and water rights on said Conner Creek, below the point where his ditch tapped the same, and that he had a right at that point, to appropriate the waters, and did so appropriate the same. (Statement of the facts, 19th Or. 456-457). He then alleged continual use of the waters; that he made his appropriation accord-

ing to the local laws and customs of Baker County, and of the State of Oregon, and the decision of the state courts of Oregon, and of the United States, and that his location was and is prior to any other location by anyone on said Conner Creek (457); that in April, 1888, while Hill, to whom he had sold water for irrigation, was using the ditch for irrigation, the defendant Cooke wrongfully, and without color of right, cut the ditch and diverted the water therefrom, and let the same run to waste, thereby preventing Hill from using it for agricultural purposes; that such acts have continued since, and will continue, to the plaintiff's irreparable damage. (457-458).

The defendant denied the material allegations, and alleged that he was the owner of lands described in his answer, being about 160 acres of agricultural, fruit growing, and grazing land, through which land said Conner Creek flowed in its natural channel; that the defendant was a riparian owner and proprietor in and upon said stream, (458) and that he and his grantors were and had been seized and possessed of said lands, and of said creek and its waters, since the year 1869; that the said lands were now so used for said purposes and had been for eighteen years last past, and were of great value; that they required artificial irrigation, without which they would be worthless.

The defendant admitted that he cut the ditch.

The plaintiff replied, denying the new matter alleged

in the answer, and alleged, by way of avoidance, the following: (460)

That in the year 1875, Hinckler was the owner of the ditches and water rights claimed to be owned by the defendant; that in said year, all of Hinckler's rights were sold by the sheriff of Baker County under execution on a judgment against Hinckler; that plaintiff's grantors were the purchasers of the ditches and the water rights at the sheriff's sale; that said sale had been confirmed, and a deed conveying the ditches and water rights had been made by the sheriff to the plaintiff's grantors, as directed in the order of confirmation; that since receiving it, plaintiff and his grantors had been the owners, and entitled to the sole use and possession of the same, up to the diversion thereof by the defendant, as the act had been alleged in the complaint. (461).

By the reply, the plaintiff also pled the Statute of Limitations against the rights claimed by the defendant (riparian). The sufficiency of the pleadings was not raised. (461)

THE OPINION IN FAULL V. COOKE, 19 OR. 461.

Here it is stated: That in 1869, the lands through which Conner Creek flows, and which are described in the defendant Cooke's answer, were unsurveyed and unoccupied public lands of the United States; that during that year, said Hinckler settled upon the same as a homestead, and, after the said lands had been surveyed, on the 6th of March, 1883 he made his regular applica-

tion therefor, alleging his settlement thereon in February or March, 1869; that upon this application, a patent was issued in March, 1885. **(Petitioner's patent, (Defendants' Ex. W, was issued April 20, 1885) (R. 301-3).** The opinion continues,—that after Hinckler had perfected his right under the homestead laws, he died, and the title to the property was conveyed to Cooke through an administrator's deed. (461-2).

We find it advisable to here set forth a quotation made from *Faull v. Cooke* in the Appx. at 59-60, in order to continue the quotation further.

Quotation from page 463 of 19th Or. Rep.:

"In *Larsen v. The O. R. & N. Co.*, decided at the present term, it was held, in effect, that a settlement made by a homestead claimant upon the public lands of the United States and compliance with act of congress on the subject, segregated the same from the public lands and cut off intervening claims, and such is the ruling of the land department of the United States.

Since the announcement of the opinion in *Larsen v. The O. R. & N. Co., supra,* this case was argued, and *our attention has been called to the recent opinion of the Supreme Court of the United States in Steers v. Beck,* 10 Fed. R. 350.

The opinion of the court in that case is very exhaustive, and fully and conclusively settles the legal question under consideration adversely to the appellant. In that case the identical question, in principal, involved here was presented, and it was held that a *homestead claimant's riparian rights attached from the date of his settlement,* provided *he complied with the law* and obtained a patent for the land, and that when such patent

was issued it related to the date of settlement *and cut off the right to divert a stream of water running through such homestead.*" (Appx. 59-60).

The foregoing quotation continued:

"But the plaintiff claims to have the superior right to this water, and he seeks to prove title to the same in two ways: first, through an ex-sheriff's deed offered in evidence purporting to convey certain ditches and water rights of Hinckler to A. J. Lawrence; and, *second, by prior appropriation and adverse possession of the water for more than ten years.*" * * * * *

"The remaining question is whether or not the plaintiff and those under whom he claims had acquired a title to this water by adverse user prior to the commencement of this suit? Did the plaintiff and those under whom he claims have such *open, exclusive, notorious* and *continuous adverse* use of this water as to bar the rights of the defendant either as riparian owner or first appropriator of it? * * * * Giving full effect to the evidence on each side, and it appears that for several years no one had the exclusive use of the water; sometimes one was using it and then another, but the possession of none of the claimants was continuous or of such a character as to constitute adverse possession against the others. It was intimated on the argument by the appellant's counsel that the water in controversy ought equitably to be divided between the parties; but I am unable to find in the evidence anything whatever upon which a division might properly be made."

Sturr, Appellant, v. Beck, 133 U. S. 541-552, 33 Law Ed. 761. (Decided March 3, 1890).

The court stated the facts involved, in substance as follows:

Sturr brought this case against the defendant Beck

in the District Court for the territory of Dakota, to prevent the defendant from interfering with plaintiff's alleged water right and ditch, and the use of the water of the creek through the same, alleging prior interference. The allegations were denied, and the defendant alleged the facts as he claimed them, and asked an injunction against the plaintiff from diverting the waters of the creek. The cause was tried on an agreed state of facts, reduced to a stipulation, which is set forth in the U. S. Report at pages 542-5, substantially as follows:

1st. Plaintiff Sturr made a homestead entry May 15th, 1880, final proof May 10, 1883, having settled on the land in June, 1877.

2nd. That John Smith made a homestead entry on other land March 25, 1879, final proof May 10, 1883, (same date), having settled thereon March 1877, (the other was June, 1877); Smith resided thereon until he sold to defendant Beck in May, 1884, and received a patent therefor.

3rd. That on May 15, 1880, plaintiff Sturr, without grant from Smith, went upon Smith's homestead and located a water right *thereon*, claiming the right to divert the waters from the creek flowing across said land in its natural channel, and to carry the same to his own homestead immediately adjacent.

4th. Plaintiff Sturr posted written notice at the point of diversion claiming the right to divert the same and filed it in the office of the County Clerk.

5th. That immediately thereafter plaintiff constructed a ditch from the point of diversion across Smith's homestead, and conveyed the water from said stream to his adjacent land, where he used it for irrigation until interfered with by defendant in the summer of 1886.

6th. May 1st, 1884, Smith conveyed his homestead to defendant Beck, by warranty deed without reservation, who immediately entered into possession.

7th. In 1886 defendant Beck notified plaintiff Sturr to cease the diversion from their natural channel upon the defendant's lands, and forbade him maintaining a ditch thereon.

8th. That the custom existing in the county since its settlement recognized the right to locate water and to appropriate it for irrigation when such location and diversion does not conflict or interfere with vested rights accrued prior thereto.

9th. Neither Smith nor defendant Beck ever made a water location claiming waters from said stream, nor had they ever prior to the plaintiff's appropriation diverted water from the channel of the creek where it had been accustomed to flow.

10th. That Smith on the 2nd day of February, 1882, recited in the written contract of that date, made with plaintiff, that the latter was the owner of the "Elm Tree water right," which was said water right located by Sturr, May 15th, 1880.

11th. That such water for irrigation is valuable to those owning or possessing the same.

Mr. Chief Justice Fuller, after stating the facts, delivered the opinion from which we quote at 133 U. S. pages 546, 547:

> "John Smith settled on the tract of land described in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to Beck, the appellee. He made his homestead filing or entry March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The water of False Bottom Creek flowed in its natural channel over and across Smith's homestead, and in May, 1880, Sturr, the appellant, went upon that homestead, located a water right thereon and constructed a ditch which diverted the waters of the creek to his own adjacent land. Beck went into possession under the deed from Smith, and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, and this suit thereupon followed.
>
> It is not contended on behalf of Sturr that he is entitled to maintain the ditch because he constructed and used it, or that Smith's acquiescence amounted to anything more than a revocable license. There was no grant nor an adverse enjoyment so long continued as to raise a legal presumption of a grant. But it is insisted that the doctrine of prior appropriation of water on the public land and its beneficial use protects him from interference because neither Smith nor Beck made any water right location claiming the waters of False Bottom Creek, and had never diverted those waters prior to Sturr's location.
>
> If, however, Smith obtained a vested right to have the creek flow in its natural channel by virtue of his homestead entry of *March* 25, 1879, and possession *thereunder,* or if *his patent* took effect as against Sturr by relation as of *that date,* then

it is conceded that Sturr cannot prevail and the judgment must be affirmed.

The right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters as a natural incident to, or one of the elements of, his estate, and that it cannot be lawfully diverted against his consent, is not denied, nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor of a prior appropriator, as between himself and Sturr, when the latter undertook to locate his alleged water right. At that time Smith had been in possession for three years, and his homestead entry had been made over a year. * * *

Here the court enters into a discussion of the United States statutes governing settlement upon public lands, and the homestead requirements as to residence thereon. And of the Act of July 26, 1866, granting rights to the use of water on public lands.

We quote further from the opinion, pages 550, 551:

By Section 17 of the Act of July 9, 1870, amendatory of the Act of July 26, 1866, it was provided, among other things, that 'all patents granted, or pre-emption or homesteads allowed, shall be subject to any *vested* and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as *may have been acquired* under or recognized by the ninth section of the Act of which this Act is amendatory.' 16 Stat. 218. And this was carried forward into section 2340 of the Revised Statutes, and *Smith's patent was subject to that reservation.*

The 9th section of the Act of 1866 is referred to by Mr. Justice Field in *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 512 (22: 414, 416), and in the

opinion it is said that 'the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams.'

WHEN, HOWEVER, THE GOVERNMENT CEASES TO BE THE SOLE PROPRIETOR, THE RIGHT OF THE RIPARIAN OWNER ATTACHES, AND CANNOT BE SUBSEQUENTLY INVADED. As the riparian owner has the right to have the water flow *ut currere solebat,* undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriations of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."

Following this the decision quotes from the Dakota statutes. The decision concludes:

"Thus, under the laws of Congress and the Territory, and under the applicable custom, priority of possession gave priority of right. The question is not as to the extent of Smith's interest in the homestead as against the government, but whether as against Sturr his lawful occupancy under settlement and entry was not a prior appropriation which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the Supreme Court to that effect."

As stated in *Faull vs. Cooke,* supra, this decision came to the knowledge of the Oregon Court after its decision of *Larsen vs. The O. R. & N. Co., supra.* The

decision in the Larsen case was made May 16, 1890 (19th Ore. 240).

Sturr vs. Beck was decided March 3rd, 1890.

Foull vs. Cooke was decided July 1st, 1890, (19th Ore. 455). So the Larsen case rested upon the doctrine as announced in this court in the two cases shown in the quotation therefrom, made from page 246 of 19th Oregon.

Brown v. Baker, 39 Or., 66-75; (65 Pac. 799; 66 Pac. 193). Decided July 15, 1901.

This was a suit to enjoin interference with the flow of the water in the *channel* of a non-navigable stream. That in 1864 one Morrison, plaintiff's predecessor, diverted said water and used the same for the irrigation of his cultivated land. That his diversion proved inadequate, and he dug a ditch in 1866 and diverted more water from a tributary thereof, and used it for irrigation of said lands.

In 1892 the defendants, having purchased lands above those of the plaintiffs on said stream, diverted the water from the stream in 1896, which they used for the irrigation of their premises; whereupon plaintiffs, claiming such use to be a wrongful infringement of plaintiffs' rights, instituted this suit.

And the lower court decreed the plaintiffs to be entitled to a specified quantity of the water of said stream through plaintiffs' ditches, and enjoined the defendants from interfering with the flow of that quantity in

the *channel* of said creek through their premises, from which decree the defendants appealed.

The defendants maintained that in order to secure priority in appropriation of water, the diversion must be made on public domain, and the plaintiffs must allege that their diversion was on their own premises. The court held:

That the water of a non-navigable stream is an incident to the soil through which it flows; that as the United States is the primary proprietor of public lands, its grant to the waters thereof in the Pacific Coast states, to the person having the priority of its possession, in the absence of a constitutional provision or statute declaring water to be public property, necessarily cuts off the right of a subsequent settler to divert the water under a claim of prior appropriation. That title by relation gives to the first settler upon public land *priority of possession of the water flowing through the same.* It cited *Faull vs. Cooke, Larsen v. Oregon Ry. & Nav. Co., Johnson v. Bridal Veil L. Co.,* 24 Ore. 182, 33 Pac. 528; *Cole v. Logan,* 24 Or. 304, 33 Pac. 568.

And it held that this is so, though the first settler may never appropriate the water to a beneficial use; that if a lower appropriator had acquired a right to the waters of the stream before plaintiffs' diversion, such rights would defeat their appropriation of the water, because the stream at the time of the diversion *was not flowing through public lands.* It held that the right

of a prior appropriator is limited to the use of water by the pioneer settler (appropriator), *before* any adverse claims of riparian proprietors attach to the stream from which the water is taken, and not from the points of diversion, which may be either within or beyond the boundaries of the tract selected by such settler.

We have quoted this case, the substance of which is here stated, at the Appx. 60-61.

In the Hood River case Mr. Justice McCourt at 114th Ore., 214-248, dissented to the opinion of the majority court. In that dissenting opinion it was stated that to initiate title to the use of water by adverse user, as against a riparian owner, there must be a hostile invasion of the rights of the latter, to use the water, which must continue uninterrupted for the period of prescription. There is no doubt as to this being the law, and we are not citing the dissenting opinion as authority, but merely to bring before the Court the cases listed in support of that text. They are six in number, and the decisions were made in the following years: 1899, 1901, 1902, 1908, 1912. A quotation from that opinion is set forth at the Appx. 62, a reference to which will serve the purpose of citation of those cases.

Cole vs. Logan, 24 Ore. 304,
(33 Pac. 568) (1893)

This was a suit between two water users from the same stream, both of whom were early settlers. Each

claimed under the doctrine of *appropriation*, and the decision was made accordingly.

This decision was cited in *Brown vs. Baker, Supra*, under the doctrine of "title by relation," as announced in the Larsen case, *Faull vs. Cooke, et al.* A sufficient statement of the facts is shown in the following quotation, which we make from 24 Ore. 308., to show the application of the "doctrine of relation," to appropriations.

> "1. The evidence conclusively shows that the defendant was a prior appropriator of the waters of Willow Creek. He made his settlement upon an unsurveyed tract of land with the intention of acquiring title thereto from the government of the United States, and had diverted and appropriated the water of said creek two and one-half years prior to the building of plaintiffs' dam, and when the defendant made his proof and obtained his patent his title related back to the time of his settlement: *Faull v. Cooke*, 19 Or. 455 (26 Pac. 662); *Larsen v. Or. Ry & Nav. Co.* 19 Or. 240 (23 Pac. 974); *Sturr vs. Beck*, 133 U. S. 541, (10 Sup. Rep. 350); and hence it follows that at the time plaintiffs made their appropriation of the waters of Willow Creek, the defendant's rights as a prior appropriator had attached, and he was entitled to the quantity of water he had diverted and appropriated for the purpose of irrigating his homestead, and that the plaintiffs made their diversion and appropriation subject thereto: *Kaler v. Campbell*, 13 Or. 596 (11 Pac. 301).

United States v. Rio Grande Dam & Irr. Co.,
174 U. S., 690; 43 L. ed. 1136.

This was a suit by the United States, through the

Attorney General, brought in 1897, to restrain the building of a dam in the Rio Grande River in the Territory of New Mexico, being built for the appropriation of the waters of the stream for irrigation. The decision by Mr. Justice Brewer deals with some of the subjects with which we are concerned, and particularly the history of the doctrine of prior appropriation on Government land, and its relation to the riparian doctrine, when those lands are patented. We quote from that portion of the opinion which deals with the Act of July 26, 1866. (At 174 U. S. 704).

> "Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the western states an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain states, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those states, by custom and by state legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as those rules have only a local significance, and effect only questions between citizens of the state, nothing is presented which calls for any consideration by the Federal courts. In 1866 Congress passed the following act (14 Stat. at L. 253, chap. 262; Rev. Stat. 2339):"

We quote the acts of Congress of July, 1866, and July 1870, set forth in:

Section 661, Title 43, U. S. C. A.:

"Section 661. Appropriation of waters on public lands; right of way for canals and ditches. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.
(R. S. §§ 2339, 2340).

The editor's comment, following said section, is as follows:

"The first paragraph of this section before incorporation into the Code was R. S. § 2339, which was derived from Act July 26, 1866, c. 262, § 9, 14 Stat. 253.

The second paragraph was derived from R. S. § 2340, which was derived from Act July 9, 1870, c. 235, § 17, 16 Stat. 218."

This is helpful in tying in the common law doctrine of riparian rights prevailing in Oregon, as modified by the doctrine of "prior appropriation." Congress thereby ratified the acts of settlers in making appropriations upon *public lands*. And we have seen that these lands cease to be public, when entered for settlement, if the settler complies with the law and obtains the patent. On the issuance of the patent, the settler's rights relate back to the date of the entry. And the riparian rights to the lands accompany the lands as part thereof, even though the settler does not own the water, but has only a usufruct therein.

OREGON LEGISLATIVE RECOGNITION OF RIPARIAN RIGHTS ARISING FROM THE LOCATION OF RIPARIAN LANDS ALONG THE STREAMS.

While we maintain that the legislature cannot declare the law so as to impair rights that have already vested under existing laws, it can declare what the law shall be in the future.

This title deals with the legislative recognition of the riparian doctrine which we contend is valuable only as showing the prevailing belief in Oregon at the times at which legislative acts were passed in which the riparian doctrine was recognized as existing. And as the court will know, legislative acts are passed more or less under the guidance of men learned in the law, so far as they involve legal questions. Hence, the courts

indulge the presumption that the legislature knew, or is presumed to know the law. But they have never allowed the legislature to tell the courts what the law is.

With this statement of our position, we call the court's attention to the following legislative enactments of Oregon in which the riparian rights, arising from the location of the lands upon the streams, were recognized and dealt with. These enactments are informative particularly because of the times at which they were passed with reference to the date of the petitioner's patent, (1885) and the passage of the Water Code (1909), (Appx. 40-45). We quote from these acts at the pages in the Appendix mentioned, below.

LAWS OF OREGON, 1891.

"An Act allowing the condemnation of rights of riparian proprietors arising from their locations," etc., allowing a condemnation and appropriation of the right to the flow of water in any stream from which it is proposed to divert water below the point of diversion "*vested* in owners of lands lying contiguous to such stream by virtue of their location." It will be seen that this act saved to the riparian proprietor water for his household or domestic use and enough to irrigate his growing crops, and actually used therefor. The rest could be condemned. (Appx. 40-41).

OREGON LAWS 1895

Providing that nothing in the Act should authorize

any person to divert waters from any river, creek, stream, etc., from its channel

> "to the detriment of any person or persons having any interest in such river, creek, stream, canal or ditch or the waters therein"

except upon compensation paid. (Appx. 41-2).

OREGON LAWS 1899.

An Act to provide for appropriation and "condemnation of rights of riparian proprietors arising from their location," etc. It allows condemnation and appropriation below the point of diversion vested in the owners of lands

> "lying contiguous to such stream by virtue of their location." (Appx. 42).

OREGON LAWS 1903, Special Session

Allowing condemnation and appropriation of the right to the flow of water in any stream from which it or they may propose to divert water below

> "the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location," etc.

Of this the Oregon court stated, it was not intended to deprive or even abridge the rights of a riparian proprietor. (Appx. 43).

OREGON LAWS 1901.

Allowing condemnation of rights of riparian proprietors arising from their location as being contiguous to the stream. (Appx. 44).

OREGON LAWS OF 1905.

Allowing condemnation of real property, water, water courses and riparian rights in Oregon for public use.

It is still in force and is now Section 37-302, Oregon Code 1930. (Appx. 44-5).

(2) The riparian right is a vested right and as such is under the protection of the 14th Amendment to the Federal Constitution, providing that no State shall deprive any person of his property without due process of law. (Sec. 1 of the 14th Amendment).

VESTED RIGHT DEFINED.

Pearsall v. Great Northern R. Co., 161 U. S. 646-677; 16 Sup. Ct. 705; 40 L. Ed. 838.

(The quotation therefor being taken from 161 U. S. 673).

"A vested right is defined by Fearne, in his work upon Contingent Remainders, as 'an *immediate fixed right of present or future enjoyment;*' and by Chancellor Kent as an 'immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent, Com. 202. It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to

come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' Cooley, Const. L. 332."

We also cite the following: (Appx. 82)

Crump v. Guyer et al, 157 Pac. 321, 322; (Supreme Court of Oklahoma, Feb. 29, 1916).

That case is also valuable here for the citations there quoted at Appx. 82-3-4.

The authorities cited at page 84 of Appx. are to the effect that

such a right is not lost by nonuser.

At page 85 of Appx. we quote

Ruling Case Law,
Volume 6, Sections 294 and 295 (page 308)

defining vested rights, their nature and origin.

We insist that petitioner's riparian rights are vested rights under the foregoing definitions.

RIPARIAN RIGHTS ARE VESTED RIGHTS

We quote from

Yates vs. Milwaukee, 77 U. S. (10 Wall.) 497-501, (19th Law Ed. 984).

This suit decided in 1870 was to prevent the City of Milwaukee, from, by an ordinance, destroying Yates' riparian rights on the Menomonee and Milwaukee Rivers in the City of Milwaukee. While it is true the rights were on the banks of navigable streams, it is also true that the riparian rights upon both navigable and

non-navigable streams, are vested and under the protection of the amendment.

> "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 19 Sup. Ct. 770, at 43 L. Ed. 1136, 1141; (1899).

quotation from 174 U. S. at 702:

> "The unquestioned rule of the common law was that *every riparian owner* was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, Sec. 439):
>
> > 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple *usufruct* while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land *as an incident to the land* he cannot unreasonably detain it, or give it *another direction* and he must return it to its ordinary channel when it leaves his state'."

—The Supreme Court of Oregon on March 25, 1919, in the case of

Hanson v. Thornton, 91 Or. 585, 591 (179 Pac. 494).

Speaking through Mr. Chief Justice McBride, likewise determined that *riparian rights are property rights* and *that any violation* of the riparian right is the *taking of private property,* which cannot be done without just compensation.

We quote from page 591 of 91 Or.:

> "One who purchases land abutting upon a lake or water-course, usually considers his right of access to such waters as an element of value in the purchase. When we speak of riparian rights, we are not considering a mere shadowy privilege but a substantial property right, the right of access to and a *usufruct* in the water. To say that the owner of such a right may without his consent be deprived of it by the state or the general government permitting some other person to obtain title to the accretion formed by an impounding or diversion of part of the waters that previously washed the shore of his land does not appeal to our sense of justice and we do not believe that the authorities generally support such a doctrine."

NEBRASKA

Clark vs. Cambridge & A. Irr. & Imp. Co. et al, N. W. Vol. 64, 239, 241. (Supreme Court of Nebraska, Sept. 18, 1895). (Quoted at Appx. 76-77).

This case holds directly that the right of a riparian proprietor *as such* is property, and when vested can

only be taken upon full compensation, and in accordance with established law. It cites the well known case *of Lux vs. Haggin,* (California), *Yates vs. Milwaukee, supra, Potomac Steamboat Co. vs. Upper Potomac Steamboat Co.,* 109 U. S. 673, and other authorities.

Mansfield vs. Balliett,
L. R. A. Book 58, 1903, 628-637
(Ohio Supreme Court, January 21, 1902).

The opinion in this Ohio case holds that authors who have investigated are agreed upon the conclusion that riparian rights are property within the meaning of the Constitution; that the right is a part of the property in the land, and in many cases constitutes its most valuable element. Here the opinion applies particularly.

The court held that it followed that any violation of that right in the exercise of the power of eminent domain is a *taking of property* for which compensation must be made. We quote from the opinion at Appx. 94-5.

Martha Lake Water Co., No. 1 *v. Nelson et al.,*
277 Pac. 382,
(Supreme Court of Washington, May 2, 1929).

This is a Washington case. The opinion quotes the Washington Constitution preventing private property from being taken, or damaged for public or private use without just compensation. This case is applicable here. It is concerning the lowering of the waters of Martha Lake, causing the water's edge to recede, and land which had been covered with water *at the time*

of its purchase to become dry land. It held that the provision of the Washington Constitution cited entitled the owner to compensation.

In our case respondent Cement Company would change the thread of the river 100 to 150 feet, and leave us the rocky, dry river bed where once the river flowed.

CALIFORNIA.

Lux vs. Haggin,
69 Cal. 255, 10 Pac. 674.
(Apr. 26th, 1886).

This is one of the strongest cases in the books supporting the petitioner's position here. From our reading, we believe that it has been quoted more, with approval, than any other of the western riparian right cases. It announces the common law riparian doctrine for which we contend. It holds that it has always been held that the grant of the land carries the grant of the water flowing over the soil. That the right of a riparian proprietor to have the stream run through his land is *a vested right,* and interference with it imports damage.

We quote substantially from the opinion at Appx. 96-7. The case is cited in the text by

Wiel, Water Rights in the Western States,
2nd Edition, Section 56, page 115.

We quote that section at Appx. 97.

Lux vs. Haggin, supra, from the Supreme Court of California, decided about the time of the decision in the Weiss case, was cited with approval by the Oregon court in 1891, in the following case:

Hindman vs. Rizor, 21 Ore. 112,
27 Pac. Reporter, 13.

The court said at the Oregon Report, 114:

"This is a suit to enjoin the defendant from diverting the waters of Alder creek, a natural watercourse, which runs through the lands of *both* plaintiff and defendant. Both parties claim by prior appropriation.

The facts are these: In 1863 the lands through which Alder creek flows were unsurveyed and unoccupied government land, and the waters thereof were free and unappropriated."

In the spring of 1863 Cleaver and Peters settled upon the plaintiff's land, and for the purpose of rendering it more productive entered on the unoccupied government land a short distance above plaintiff's land and diverted waters from the stream in question.

In February, 1877, the defendant settled upon the lands owned by him above the lands of the plaintiff (as a homestead), received his patent, and against the rights of the plaintiff claimed rights to use certain of the waters of the stream as against the plaintiff's appropriation. Defendant claims that because the title of several of those occupying the land from Cleaver down to Rowley had been acquired by the purchase of the possessory rights only, and not by deed, that the right was lost and abandoned; that the water right could only be transferred by deed; that he was in consequence of his appropriation of 1877, prior in right to the appropriation of the plaintiff, which in any view

could only date from Rowley' settlement in 1881. In 1881 Rowley had by other such transferred possessory rights acquired possession of plaintiff's property and filed thereon, perfected title to the property in 1882, and deeded it to the plaintiff.

The Oregon court said: (pages 116-17)

> "This is the only question necessary for us to consider. If plaintiff has connected herself by a proper title with the rights acquired by Cleaver and Peters to the waters of Alder creek, her rights are unquestionably superior to those of the defendant, for whoever purchases land from the United States after the whole or some part of the water of a natural water-course running through such land has been appropriated by some one else, takes subject to the rights acquired by such prior appropriator. (*Kaler v. Campbell,* 13 Or. 596; *Lux v. Haggin,* 69 Cal. 255). If however, her rights only date from the settlement of Rowley in 1881, the appropriation made by defendant in 1877 gives him a superior right to the quantity actually appropriated."

Of course, all rights involved were rights gained by appropriation. But the Oregon court followed *Lux vs. Haggin* to the effect that whoever acquires land from the United States after some of the water of the natural water course running through it has been appropriated by some other person, takes the land subject to such prior appropriation.

The doctrine of *Lux vs. Haggin* relative to riparian rights is discussed below in connection with the encroachments by the California Act of June 16,

1913, (creating the Water Commission), with regulatory powers, and the California Constitutional Amendment of 1928, as they have been applied by the California court. This Legislative Act and the Amendment to the California Constitution, with California cases, is discussed herein under the heading of the "Police Power," and particularly at pages 214-239 hereof.

The Fall River Valley District case, (cited below), held that the Commission Act (assuming it to be valid) did not impair riparian rights which had vested prior to its passage. And as to riparian rights and rights by appropriation, the decision held that the California court must give effect to its own decisions pronouncing that a mere appropriator, until he obtains title by prescription, is as against the right of a riparian owner, a trespasser, citing

Pabst vs. Finmand,
190 Cal. 124, 132,
(211 Pac. 11, 14).

RIGHT NOT LOST BY NONUSER.

We also there cite:

Fall River Valley Irr. Dist. v. Mt. Shasta Power Corporation, 202 Cal. 56, 259 Pac. 444, 448. (Supreme Court of California, Sept. 1, 1927) (Appx. 77).

It is to the effect that the riparian right is a vested property right inhering in and part and parcel of the abutting land; it is a right not gained by use, *nor lost by*

disuse, qualified only by the rights of other riparian proprietors on the stream. It then asserts the riparian doctrine of the ordinary natural flow undiminished, etc., as announced in the Oregon cases cited. It holds that such a right is entitled to the same respect and protection at the hands of the law as any other vested property right.

Please also see

Ruling Case Law, Volume 27, page 1071, Subdivision 12, quoted at Appx. 78.

Riparian Rights as Property. The text is to the effect that such rights are an incident to the ownership of the land adjacent to the water, and may be lost by grant, condemnation or prescription; that they cannot be taken by the state for public use without compensation to the owner, and cannot be taken at all or impaired for a private use.

SOUTH DAKOTA

in

St. Germain Irrigating Co. v. Hawthorn Ditch Co., 143 N. W., 124-128, (Supreme Court of South Dakota, Sept. 23, 1913),

also held such rights to be vested property rights and under the protection of the Amendment. (At Appx. 78). We quote from that court, taking the quotation from 143 N. W. at 126.

At pages 90-1-2 of the Appx. we quote from

Brewer-Elliott Oil & Gas Co. v. United States, 270 Fed. 100-110, (affirmed by this court, 260 U. S. 77-89, 43 Sup. Ct. 60, 67 L. Ed. 140-147).

The importance of this case is, of course, emphasized by the fact that it was affirmed on appeal in this court. It is to the effect that the government disposes of its riparian rights at the times of the respective grants, and makes no reservation in the grants for the future. That when once vested the owner cannot be deprived of the riparian right except in accordance with established law. That if it is necessary to take it for the public good, it must be upon due compensation. It cited *Yates vs. Milwaukee, supra.*

We commend the court's attention to the quotation at Appx. 90, 91.

The case was affirmed upon appeal, and this court said:

That it is not for a state, by courts or legislature, in dealing with the general subject of the *beds* of streams, to adopt a retroactive rule for determining navigability which would destroy a *title already accrued under federal law and grant.* (And we say here that when the riparian lands on both sides of the river were patented, that the river bed and the water were common to both, under the Federal Statute of May 18th, 1796, above referred to. So far as the doctrine of riparian rights is concerned, this statute was but an affirmance of that right, but it was read into, *and it became a part of*, the patents to the riparian lands of both the

petitioner and the respondents. So too, the statute stated the acknowledged and established common law rule, which should apply irrespective of the statute).

This Court further held in the Rio Grande case that where government patents contain no words showing a purpose to define riparian rights, the intention to abide the state law is inferred, quoting (Appx. 92),

Hardin v. Jordan,
140 U. S. 371, 384,
35 Law Ed. 428, 434.
11 Sup. Ct. Rep. 808.

That riparian rights are vested rights and protected by the Constitution, we also cite:

Thiesen v. Gulf, F. & A. R. Co.,
L. R. A. 1918 E., 718-738 (Fla.)
(Decided November 3, 1917).

This Florida case quotes Mr. Justice Miller in *Yates vs. Milwaukee, supra,* that when once vested, such a right cannot be taken, even for public good, except upon due compensation, (citing).

The court said that riparian rights were property rights; that in many cases the riparian rights incident to the ownership of the land, were perhaps the principal, if not the sole inducement leading to its purchase, and the reason for the price charged by the seller.

Petitioner is shown in the record to have acquired the land for its power purposes, and it is shown to have no value except therefor. It is peculiarly well situated for petitioner's stand-by plant to furnish power during

times of break down in the service on the main feeders.

(We quote from this case, Appx. 93).

Retroactive Acts.

The Appellate Court followed the Oregon Court in Re Hood River, in this respect,—that Section 70 of the 1909 Water Code, (Appx. 29-31) particularly Subdivision 2 thereof, (Appx. 29) destroyed riparian rights which had not been put to a beneficial use at the enactment of the code.

If that construction be applied to petitioner's riparian rights, it takes petitioner's property in violation of the 14th Amendment. It, in effect, holds that said section of said water code is *retroactive*. It causes this legislative fiat,—this usurpation of the functions of the judiciary,—to step back to 1885, the date of petitioner's patent, and, by *definition*, destroy its vested riparian rights. Such statutes, being thus *violative* of the amendment, must be construed as prospective and *not retroactive* in the application.

(3) Legislative Acts Impairing Vested Rights Must Be Construed as Prospective Laws, Not Retroactive Laws.

We quote from this court, as follows:

Sturges vs. Carter, 114 U. S., 511-523 (May, 1885), 5 Sup. Ct. 1014, 29 Law Ed. 240-244; Quotation from 114 U. S. at page 519.

"In the case of *The Society for Propogating the Gospel v. Wheeler*, 2 Gall. 139, Mr. Justice

> Story thus defines a retroactive, or, as he calls it, a retrospective law: 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, *must be deemed retrospective*'." (Appx. 85).

We also cite:

> *Wilkinson*, plff. in Error, *v. Leland*, Dfdt. in Error, 27 U. S. (2 Pet.) 658; 7 L. ed. 553

We further cite the following authorities from the citations made in the appendix hereto, at the pages indicated below.

> *Hoyt Metal Co. v. Atwood*, 289 Fed. 453, 454-455; (Ill.) (1923) (Appx. 85-86)

This Federal case holds, citing numerous authorities, that a vested property right cannot be taken by the declaration of a retroactive act, and that where retrospective acts would destroy vested rights, they are presumed to be prospective only, unless the contrary *clearly* appears.

In the instant case such intention does not clearly appear from the language used. Subdivision 2 of Section 70 provides that the application of the water to a beneficial use prior to the passage of the act, "shall be *deemed to create* in such *riparian proprietor* a vested right to the extent of the actual application to beneficial use." Note that it *does not say* that *these rights*, such as petitioner's, which had not been used, *were not vested*

rights. The language used was in an effort to convert the used riparian right into an appropriation, as shown by the provisions of Subdivision 3 of Section 70, which provides for the completion of facilities for the use of the water, the construction of which had already been begun. Such a construction applied, cuts off the riparian doctrine completely, and destroys it, and we have nothing left but rights by appropriation. Properly and constitutionally construed, the water code leaves petitioner's riparian right as it was when petitioner's patent was issued.

Favot vs. Kingsbury, 98 Cal. App. 284; 276 Pac. 1083; (April, 1929) (Appx. 86).

Here the California court held:

That the state has no power to divest or to impair vested rights by legislative enactment, municipal ordinances or change in its Constitution.

Travelers' Ins. Co. v. Ohler, (Neb.) 227 N. W. 449, 450. (November, 1929) (Appx. 87).

Here the Nebraska Court said that a legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively, where it will have the effect to invalidate or impair the obligation of a contract, or interfere with vested rights, citing 2nd Lewis' Sutherland, Statutory Construction (2d Ed.) § 642, and other authorities.

Board of Sup'rs. of Arenac County v. Board of Sup'rs. of Iosco County, 122 N. W. 629; (Sup. Ct. of Mich., Oct. 4, 1909.) (Appx. 87).

Here, the Supreme Court of Michigan held that rights which had been vested by statute were not lost by a later amendment thereof. It laid down these rules: (1) That statutes will not be construed as retroactive unless the intent that they should be retroactive clearly appears (citing); and (2) A statute cannot be construed retroactive to the detriment of vested rights. (Citing).

Crawford Co. v. Hathaway et al., 93 N. W. 781. (Sup. Ct. of Nebraska, Feb. 4, 1903.) (Appx. 88).

Here, the State of Nebraska, by its legislative act, attempted to abrogate the common law riparian doctrine, and to substitute in lieu thereof the doctrine of appropriation. The court held that this legislation could not have the effect of abolishing riparian rights which had already accrued, but could only have the effect of preventing the acquisition of such rights in the future. And it said that such a law is only applicable to those waters which were unappropriated; "or any other waters which have not become the property of riparian proprietors."

L. D. Lowe and Wife v. James Harris, L. R. A., Vol. 22, 379; (North Carolina Sup. Ct., May 5, 1893) (Appx. 88).

In this case, the Supreme Court of North Carolina said that the legislative act under consideration could be held to modify or repeal the statute of frauds, but it

could *not* have retroactive operation, this being restricted by the fundamental rule that no law which operates to disturb or destroy rights already vested, shall be construed to operate *retrospectively*. It said that no law which *takes property from one* and *vests it in another* for the other's own private purposes, and without the owner's consent, has ever been held to be a constitutional exercise of the legislative power in *any* state of the Union (citing authorities).

See also:

Ruling Case Law, Vol. 6, page 305, Section 291 (Appx. 89-90).

The author, at Section 293, page 307, also says that statutes retrospective in their character and operation directly affecting and divesting vested rights, are generally construed as founded on unconstitutional principles, hence inoperative and void.

(4) THE OREGON WATER CODE, AS CONSTRUED IN THE HOOD RIVER CASE, SUPRA, AND IN THE OPINION OF THE APPELLATE COURT, IS VIOLATIVE OF THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

In support thereof, the petitioner maintains that subdivision 2 of Section 70 of the Water Code, as so

construed, destroys the vested rights of petitioner, upon the ground that its riparian rights had not been used at the date of the enactment of the code. It especially preserves to some extent, such rights in riparian proprietors who had used their rights for beneficial purposes prior to the enactment of the code, but denies this same right and privilege to all who had not so used their own vested rights, and in which class is petitioner.

In that respect the subdivision No. 2 of Section 70 permits the riparian proprietor who had so used his right before the enactment of the code to retain the priority of his right to the use of the waters as of the date that he acquired the riparian right. Carefully considered, this seems to us to create a right by appropriation as of the date of the settlement upon the land.

By subdivision 2 and subdivision 3 of Section 70, such riparian rights as are so preserved, are continued to the extent of the actual application to a beneficial use. Under subdivision 3, works begun for the use of the water prior to the enactment of the code, must be completed within a reasonable time after the passage of the act.

This construction amounts to a classification of the holders of riparian rights which have been vested, viz.,

Class 1 includes petitioner, whose rights are "abrogated." (R. 450, 73 F (2d) 569).

Class 2 includes those who had, at the enactment,

made some use of the water, and who were allowed to proceed therewith and complete the use which they had begun by the development of whatever projects they had started. From that time on under said interpretation of the code, they would proceed as riparian owners with a vested right, limited as aforesaid, to the extent of the use made at the enactment, with the right to complete constructions formerly begun.

From a consideration of Section 1 of the act, there arises a third class of users.

In this class are the respondents. They have attempted to initiate rights by appropriation, based upon permits issued under said section 1.

We contend that Section 1 makes such appropriations *subject to existing rights.* And of course we maintain that under all circumstances, the respondents' permits are issued subject to the existing common law riparian rights of the petitioner. The construction so put by the state court upon these sections of the water code, *deny* to the petitioner the *right of priority as of the date of its settlement upon the land,* purely upon the ground that it had not put the water to a beneficial use before the enactment of the Code. Inasmuch as there was never any law requiring the riparian proprietor to use the rights at any particular time, *nor was any notice of any kind ever given* that such an enactment as the Water Code, with its emergency clause, would cut off riparian rights *that had not been*

so put to a beneficial use, petitioner's property is taken *without an opportunity* to make a use, which, under the act would save it from confiscation.

There is the further discrimination and denial of the equal protection of the laws in that a stranger to the stream, or another riparian proprietor, may initiate, by appropriation, a prior right to the use of the water than that acquired by the petitioner at the issuance of its patent, years previous to the enactment.

The construction as placed upon the act by the appellate court would further deny petitioner the equal protection of the laws in permitting respondent Cement Company, by the deepening of the river channel, to draw from petitioner's lands practically all of the water of the stream, (a right which it did not have before), and with no other right than the exparte permits of the State Engineer allowing it an appropriation "subject to existing rights." As well might the State Engineer give to the Cement Company the right to enter upon petitioner's land and construct the diversion works, which privilege the Appellate Court has already denied the Cement Company in the former case between the parties. (35 Fed. 2nd, 317).

The injunction in the decree in that case is alleged and pled in paragraph V of the Bill of Complaint, (R. 7-8) and admitted in the answer at its paragraph VI, (R. 23).

At the times at which the patents issued to the lands

of the respective parties, such patents carried with them the riparian rights in the waters of the stream on which they bordered. The then owners of these lands had exactly the same rights in the stream, viz: The common law riparian rights then applicable in Oregon. In this case the rights of both parties were affected by the McClure right to its extent of the 75 second-feet. This right has a priority of 1879.

In 1889, just prior to the enactment of the Water Code, the City's 220 second-feet of water was appropriated by Oregon Water & Power Company, the predecessor of respondent City.

Hence at the time of the passage of the Water Code the proprietor of the respondents' land had begun to use the waters of the stream as an appropriator. Under the terms of the Water Code this right was preserved with its priority.

So that when the Water Code was passed, the owner of the petitioner's land held unimpaired the riparian rights belonging thereto.

But the proprietor of the City's lands has continued under the doctrine of appropriation, resulting in the application for the permits in question, and the efforts to seize and appropriate practically all of the waters of the stream thereunder.

By the construction of the Code in the Hood River case, as applied in the Appellate Court, petitioner's riparian rights were confiscated, because the water had

not been applied beneficially. As so construed, the respondent Cement Company, claiming appropriations made under the Code, is now allowed to deprive the petitioner of its riparian rights to the use of its portion of the waters of the stream. Had the respondents, at the time of the Act, been engaged in constructing works for the use of the water as a riparian proprietor, they would have been allowed under that construction of the Act to have completed their works, and so as a riparian proprietor have taken all of the waters of the stream from petitioner. But as the respondent Cement Company, in the possession of the permits in question, insists on its right under its permits to take practically all of the waters of the stream from petitioner (under the construction of the Code as adopted herein), petitioner has been by the state, in the enactment of the Water Code, as the same is construed by the highest court of said state, denied the equal protection of the laws. The Act, as construed, gives to any appropriator, including the Cement Company, the right to appropriate and take all of the water covered by petitioner's riparian rights. As so construed, the water is taken from the petitioner and transferred to the Cement Company.

NOR SHALL ANY STATE * * * DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAW.

This petitioner, a corporation, is a person within the meaning of the foregoing provision, as has been many times determined in this court. It has also been so held in the State Court.

Minneapolis & St. L. Ry. Co. v. Beckwith,
129 U. S. 26-36;
32 Law Ed. 585.

Portland Light & Power Co. vs. Realty Commission, 56 Ore. 468, at 485;
(105 Pac. 709;
109 Pac. 273) (1910)

As is well known this "Equality Clause" was inserted into the Constitution for the protection of the negroes, then recently liberated from slavery. Consequently the earlier cases under it had to do with the personal rights of individuals. Gradually this was extended to include laws affecting property. And so now it applies to the protection of both the person and the property. The "Equal Protection of the Laws Clause" is now capable of being applied to every variety of cases that may arise. This court, however, seems carefully to consider the application of the provision in each particular case for the preservation of the rights of the individual and his property.

The observations of Freund made in 1904 are of interest:

Freund Police Power,
Section 610, page 631:

"§ 610. Equality and equal protection of the laws. —In the thirty years that have passed since the de-

cision on the Slaughter House Cases the equality provision of the Fourteenth Amendment has, however, assumed an entirely different aspect. The principle of equality is relied upon more and more to check the exercise of governmental powers, and the controlling jurisdiction of the federal supreme court is invoked with increasing frequency to give it effect.

The precise meaning of the clause in question has, however, not yet been defined. The words are 'nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws.' The equal protection of the laws does certainly not mean equal participation in government, and its primary meaning is simply equal security in person and property."

In a tax case in 1874 this court used the following language in

Savings and Loan Assoc. v. Topeka,
87 U. S. 655-670; 22 L. ed. 455 (1874).

"The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer he his, but should henceforth be the property of B. *Whiting v. Fond du Lac,* 25

Wis. 188; Cooley, Const. Lim., 129, 175, 487; Dill Mun. Cor., sec. 587. * * * *

> To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises, and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

In 1879 in a case from which we are about to quote, this court was dealing with the petition of one of the colored race, who charged the County Judge of one of the counties of Virginia, an officer charged by law with the selection of jurors, with excluding those jurors of petitioner's race. The case has interest here in the discussion of the wide scope of the application of the provision of the Amendment.

Ex Parte, Commonwealth of Virginia,
100 U. S. 339-370; 25 L. ed. 676, 679. (1879)

> "Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

In 1894 this court considered a suit to restrain the enforcement by state officers of unjust and unreasonable rates fixed by state authorities under a state act,

the rates being with reference to freight and passenger service of the carrier. The case has been many times cited in this court.

Reagan v. Farmers Loan & Trust Co.,
154 U. S. 362, 399;
38 L. ed. 1014, 1024 (1894).

"It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In

Cotting v. Godard,
183 U. S. 79,
46 Law. ed. 92,

decided here in 1901, this court passed upon an act of the State of Kansas limiting the amount of charges to

be made by a stock yards company, without limiting the charges to be made by any other similar corporations doing a similar amount of business, and without reference to the character or value of the services rendered. Although the statute was general in its terms, it was made applicable to any corporation doing business of a designated volume. The statute made a positive and direct discrimination between persons engaged in the same class of business, and based the discrimination entirely upon the quantity of business done by each.

This court quoted from *Reagan vs. Farmers Loan & T. Co., supra.* It also made a quotation from the Railroad Commission cases in the language quoted below.

> "In Railroad Commission Cases (p. 331, L. ed. p. 644, Sup. Ct. Rep. p. 345):
>
> 'From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law'."

The case cites cases in this court applying the "Equal Protection of the Laws Clause" of the Amendment to a very great variety of cases. It made the following quotation from a case decided here in 1886, passing upon a state law imposing an attorney's fee upon railroad cor-

porations omitting to pay certain claims made against them, within a certain time after their presentation, and which statute applied to no other corporations or individuals. The statute was held unconstitutional as denying to the corporation the equal protection of the laws.

The quotation follows:

> "'In *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U. S. 150, 159, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255, 258, in which was presented solely the question of classification, we said, referring to many cases, both state and national:
>
> 'But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins,* 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064, 1071: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.'"

In 1927 this court decided *Louisville Gas & Electric vs. Coleman,* cited below, a case testing the constitutionality of a state statute excepting from a tax upon recorded mortgages, those instruments in which the indebtedness matured within five years. The law was general as to the taxation of mortgages of record, but made the exception as to those maturing within a five-

year period. While this court held the statute valid, it did express the law applicable under the "Equal Protection Clause." It held that the "Equal Protection Clause" means that the rights of all persons must rest upon the rule under similar circumstances.

In the Water Code, as construed, the rights of appropriators were preserved. The rights of riparian proprietors who had not used the same were "abrogated." Rights were given to others similarly situated to acquire through the State Engineer's permits all of the water of the riparian proprietor who had not at the time of the enactment put the waters to a beneficial use. As the emergency clause was attached to the Act in the closing hours of the Legislature, the law became effective immediately when filed with the Secretary. The law contains no provision saving to the riparian owner any vestige of his riparian rights. Such a riparian proprietor could do nothing but stand upon the constitutional right that had vested at the time the government patented the title to his land.

As construed the law granted to any other user on the stream similarly situated to the petitioner, the right to take the petitioner's vested rights to the use of the waters of Rogue River, and thereafter forever debar him from the use thereof, taking from his land without compensation or notice, the principal value thereof.

Of the "Equal Protection Clause" Mr. Justice Sutherland in

Louisville Gas & E. Co. vs. Coleman,
277 U. S. 32, 37,
72 Law. Ed. 770, 773-4, (1927),

said:

"The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky R. Tax Cases,* 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; *Magoun v. Illinois Trust & Sav. Bank,* 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *Santa Clara County v. Southern P. R. Co.* 9 *Sawy.* 165, 18 Fed. 385, 388-399; *Re Railroad Tax Cases,* 8 Sawy. 238, 13 Fed. 722, 733."

A state law may be fair on its face and impartial in appearance, yet it may be so construed and administered as to make an unjust and illegal discrimination between persons of similar circumstances, and amount to a denial of equal justice within the prohibition of The Constitution.

The 1909 Water Code professed through its title to be an Act providing a system for the regulation, control, distribution, use and right to the use of water, and

for the determination of existing rights thereto. It is from the title that we learn in the first instance the purpose of the Act. So its purpose is to regulate and control the disposition and use of water; also to determine the existing rights. In it there is no intimation of an intention to destroy the riparian right which commanded and controlled most of the waters of populated sections of the state. Had it been the intention to do so, a few words would have clearly expressed that intention. In the Act there is not a word concerning the regulation, control, disposition, use and right to the use of any waters controlled by the riparian rights of those whose lands bordered upon the non-navigable streams. The title is innocent of any expressed purpose to impair, to say nothing of "abrogate," existing riparian rights.

Section 1 allows appropriations of water to be made as in the Act provided, subject to existing rights "*and not otherwise.*" It expressly provides that nothing therein contained shall be so construed as to take away or impair the vested right of any person, firm, etc.

The succeeding paragraphs provide for a Board of Control, for a system for determining existing rights, for making appropriations, etc. And then we come to Section 70, with its eight subdivisions. Number 1, renews the pledge that nothing in the Act shall impair the vested right of any person, association, etc.

And Subdivision 2 provides that the application of

water to a beneficial use prior to the passage of the Act by a riparian proprietor

> "shall be deemed to create in such riparian proprietor a vested right"

to the extent of his use, etc.

In all these provisions the Code is innocent of any wrong to be perpetrated upon the riparian proprietor in the position in which the owner of petitioner's lands was at the time of the enactment.

The state proceeded along with a few adjudications until six years had passed. A suit was on its way to this court to determine whether or not the Act would impair vested riparian rights. In the Bill of Complaint in that suit thousands of acres of riparian lands were described. Just before the hearing in that case in this court, the Oregon court decided In Re Willow Creek. In passing upon this identical question, it assured the world that the Act was innocent of any threat to the vested riparian holder; it quoted Section 1 of the Act and Subdivision 1 of Section 70, as an assurance that the administration of the Act would not violate vested rights. And as a further assurance to this court, it quoted controlling authorities in the Oregon court, and in the Appellate court, to the effect that the riparian common law doctrine was too firmly established in Oregon to be now "shaken" by decree or legislation; that both the riparian doctrine and the doctrine of appropriation could exist in the same community. Mean-

ing to say to the world and to this court that the Act permitted the administration of the rights of both classes,—riparian—appropriation. And so this court accepted the assurances and definitely determined that it was not the intention of the Legislature to impair vested rights, such as petitioner's. Throughout the administration of the Act, however, the adjudication proceedings show that there was a disposition to crowd out riparian claims and to treat them as appropriations.

Finally, in 1926, in the Hood River case, the court for the first time made the announcement that the riparian doctrine of continuous flow would take the heart out of the Water Code.

In all this there was no suggestion that the court overruled its decision in the Willow Creek case, nor that it found it necessary to use the so-called police power to destroy the vested riparian rights.

At page 174 of the Hood River case, it is stated that by the Water Code the legislature

> "in its wisdom, saw fit to define what shall be deemed to constitute a vested right in a riparian proprietor."

Of course, it did not declare anything of the kind. It simply said that a beneficial use should be deemed to create in the riparian user a vested right. There was no language to exclude the vested right of your petitioner, nor of any other riparian owner. The language simply meant that he who had used it for a particular purpose

had a priority and the vested right to continued the use thus begun. Not even by interpretation can one fairly read into the language the "abrogation" of the common law right.

Whether intentionally or not—let us assume innocently—the writer of the two opinions, Re Willow Creek, Re Hood River, turned about face. In the first, such rights as petitioner's were preserved. In the second, they were destroyed. The vice, therefore, is in the application and administration by public authority so as to practically make unjust and illegal discriminations between persons in similar circumstances, and in violation of the "Equal Protection of the Laws Clause."

We make an apt quotation from the opinion of this court, rendered in 1885, in

Yick Wo v. Hopkins,
118 U. S. 356-374;
30 Law Ed. 220-228

Quotation from the Law Ed. at 227:

> "In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities

charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor, etc.* of New York, 92 U. S. 259 (Bk. 23 L. ed. 543); *Chy Luny v. Freeman,* 92 U. S. 275 (Bk. 23, L. ed. 550); Ex Parte Va. 100 U. S. 339 (Bk. 25 L. ed. 676); *Neal v. Delaware,* 103 U. S. 370 (Bk. 26 L. ed. 267), and *Soon Hing v. Crowley* (supra)."

Here, from the history of the Act, and of the administration of the Act and the methods used to arrive at particular conclusions, it seems there has been a constant effort to so administer the Act as to strangle by adjudication decrees the riparian rights existing on all non-navigable streams.

To illustrate see

In Re Sucker Creek,
83 Ore. 228,
(163 Pac. 430) (1917).

In that case the Oregon court decreed Mrs. Leonard's riparian rights as waived because she had, throughout

the proceedings, claimed the right to irrigate a definite number of acres, and with a definite amount of water through ditches. A quotation is made from the opinion in that case at Appendix 67. In the portion of the opinion quoted, it is also stated that an appropriation comes through active steps taken, while the riparian "*accompanies the ownership of riparian lands.*" And this in the year 1917, between the dates of the Willow Creek and the Hood River decisions.

So, too, in the most recent case, the Deschutes case (cited), the court insisted positively on forcing the Deschutes Company into the position of an appropriator. This practice can be followed through most of the adjudications in the Oregon Reports. So that the inequality is in the construction and also in the application of the Act.

But after every such judicial effort there seems to again come a decision from the same court reaffirming the right that will not down.

The doctrine of the Oregon Court construing the "Equal Protection of the Laws Clause" of Section 1 of the 14th Amendment. Construing this clause of the Amendment, it is the doctrine of the Oregon Court that a statute to be valid, which contains a classification of persons or things, for the purpose of legislation, must make such classification as will be a rea-

sonable one and based on real distinctions in the subject matter, which bear some relation to the objects sought to be accomplished by the statute.

We cite:

Oregon Tunnel District No. 1 v. Moore et al,
120 Ore. 594,
253 Pac. 1 (1927).

This was on appeal to the Supreme Court of Oregon from a decree holding Chapter 319 of the Laws of 1921, an Act providing for the formation of Tunnel Districts, as violative of Section 1 of the 14th Amendment, and of the Oregon Constitution, etc. The Act divided all owners of taxable real property within the district into two classes, those owning land of more than 5000 feet in area, and those owning less, in the other class.

The quotation here made further explains the facts.

(Quotation from the Oregon Report, 598-9):

"2. It will thus be seen, that under the provisions of this act all owners of taxable real property within the district are divided into two classes; those owning land of 5,000 feet or more in area, and those owning land of a less area, and that the classification has no real or substantial relation to the objects and purposes of the act. It is not within the legislative power of the state to make a classification which confers upon one class, privileges and immunities which are denied to another class, unless the classification is a reasonable one and is based upon some real and substantial distinction between the two.

The purpose of this act is to create a local improvement territory and to spread the burden of paying for the improvement by levying an ad valorem tax upon the property benefited, which under this act consists only of the real property within the district. The amount of the tax, which under the act may be levied against the real property of the various land owners of the district, is not to be determined by the area of the land held by them, but is to be determined solely by the assessed valuation of the land appearing on the assessment roll of the county. Under these circumstances, the area of the land upon which the tax is to be levied cannot in any way affect the burden imposed, and therefore this classification based on area alone can have no reasonable relation to the object sought to be accomplished by the act. If the tax to be imposed was to be based upon area and not upon value, there would be a reasonable relation between the area and the object of the legislation, but since value and not area determines the amount of the tax which is to be imposed against the land owners within the district, any classification which disregards value and is based on area alone, and gives to one owning more land but of less value any right, privilege or immunity which is denied to another owning less land, but of greater value, denies to the latter the protection of *equal laws* and violates both the state and federal Constitutions. The classification contained in this act is purely arbitrary and creates discriminations not based upon any real or substantial differences or distinctions. In order that a statute be valid which contains a classification of persons or things for the purpose of legislation, such classification must be a reasonable one and must be based on real distinctions in the subject matter which [illegible] some relation to the objects sought to be accomplished by the statute: 12 C. J. pp. 1148, 1149."

If by *construction* of Subdivision 2 of Section 70 of the Water Code, it is to be held as follows:

(1) That the riparian rights of the riparian proprietor which had been beneficially used prior to the enactment of the Code are preserved to the extent of the actual application to beneficial use, with the right to complete any works begun prior to the enactment, but that,

(2) The riparian rights of the riparian proprietor who had *not*, prior to the enactment of the Code applied the water to a beneficial use *are "abrogated,"* R. 450, F. 569, and that,

(3) As to those in class number 2, *his* water may be appropriated under Section 1 of the Code, *freed* from his prior rights as a riparian proprietor,

There exists a classification which makes a discrimination, violative of the "Equal Clause" provision. And more particularly in this:

That such a classification destroys the vested right which had not been used prior to the enactment, and grants the privilege to the riparian classified under number 1, *to take all* of the water from the riparian described in number 2, and grants to the stranger to the stream, or to another riparian proprietor thereon, the right to appropriate the waters, in the use of which, the proprietor in class number 2, *had a right that vested at the issuance of his patent*, and prior to the enactment of the Code.

If, as stated in Re Willow Creek, in 74 Ore. at 610, that by the Code

> "the state, being interested in providing a system for the regulation of the use of the water and for the determination of existing rights thereby exercised the police power of the state in order to provide a complete system of state *control*, in the *regulation of the diversion and use* of the water, *and a means for having a record made* of the rights to the same, for much the same purpose as records of title to real estate are provided,"

then the classification made, as the act is construed, has *no relation whatever to the purposes* of the Act.

Again, at pages 613-14 of the Willow Creek case, language was used which was cited by this court in *Pacific Livestock vs. Lewis, supra*, to the effect that the Act was

> "To accelerate the development of the state, to promote peace and good order, to minimize the danger of vexatious controversies,"

and to provide a convenient way for adjustment and recording of the rights.

None of these purposes as so stated have the slightest relation to the confiscation of the water, the right to the use of which, belonged at the time of the enactment, to the riparian owner whose lands had been patented, *prior* thereto.

If it be argued that the purpose is to obtain more water for these purposes, then the classification is the more discriminatory in the taking of the property of

one, and transferring it by legislative act to another, who had no color of title or right thereto.

We call the court's attention also to

United States Automobile Service Club vs. Van Winkle, Attorney General,
128 Ore. 274,
(274 Pac. 308) (1929)

This decision decided the constitutionality of Section 4 of Chapter 419 of the Oregon Laws of 1927, page 590, (Section 4 being at page 593).

The Act was entitled one to define motor club service, and to define, license and regulate companies engaged in selling, furnishing or procuring the same for consideration, to owners and operators of motor vehicles, and providing a penalty.

Section 3 provided for the issuance of licenses by the Commissioner (defined to be the Insurance Commissioner) and the Act forbade transacting business without such license.

Section 4, among other things, provided that no license should be granted except to one who had proved to the Commissioner that it had been in continuous, active operation in the state for a period of *five years,* immediately preceding the enactment, and had a paid membership of more than 5,000 members, etc., and herein lies the discriminatory classification.

The opinion by Mr. Justice Rand stated that it was contended by plaintiff that the Act violated the 14th

Amendment to the Federal Constitution, among other things, in that it

> "denies to plaintiff the equal protection of the laws and also grants to others in the same pursuit and under like conditions, privileges and immunities not conferred upon plaintiff,"

specifying the discriminations, supra.

The decision holds that if any substantial distinction exists between the two classes of corporations, then the question of classification based upon the difference, would be one for the legislature to decide, and that the decision would be conclusive upon the courts

> "*if* it were a reasonable and not arbitrary classification, even though burdens were imposed upon one class which were not imposed upon the other."

The case quotes from the Oregon Tunnel case, supra, that the classification must be a reasonable one, based on real distinctions in the subject matter *which bear some relation to the object sought to be accomplished by the statute.*

It was contended that notwithstanding this, it was within the *police power* to so classify, and the statute should be upheld on any ground which "might" have seemed plausible to the Legislature, even though there was no reasonable ground for the discrimination provided in the Act. It held that while the police power is very broad, the Legislature is not the final judge upon that question, citing

Union Fisherman's Co. v. Shoemaker,
98 Ore., 659,
(193 Pac. 476;
194 Pac. 854).

We quote from 128 Ore. at 284:

> "The classification provided for by Section 4 of the act is not founded upon any substantial difference between the two classes provided for. *It denies to plaintiff the equal protection of the laws* by imposing upon plaintiff a burden which is not imposed upon one of plaintiff's competitors, which is engaged in the same pursuit at the same time and under like circumstances and, therefore, violates the Fourteenth Amendment of the federal Constitution."

It will be noted that the Tunnel case and the Automobile Club case, supra, were both decided subsequent to the decision in the Hood River case.

This case will be further cited under the title of "Police Power."

ADDITIONAL AUTHORITIES SUPPORTING POINT 2 AND POINT 3, THAT SUCH VESTED RIGHTS ARE UNDER THE PROTECTION OF SECTION 1 OF THE 14th AMENDMENT TO THE FEDERAL CONSTITUTION.

Pumpelly v. Green Bay Company,
80 U. S. 166, 177-179; 20 L. ed. 557.

Missouri Pac. Ry. Co. v. Nebraska,
164 U. S. 403; 41 L. ed. 489.

Chicago B. & Q. R. Co. v. Chicago,
166 U. S. 226; 41 L. ed. 979.

Houston & Texas Central Ry. v. Texas,
170 U. S. 243, 261; 42 L. ed. 1023.

Lake Shore & M. S. Ry. Co. v. Smith,
173 U. S. 684; 43 L. ed. 858.

Muhlker v. N. Y. Ry. Co.,
197 U. S. 544, 570; 49 L. ed. 872.

Cleveland Elec. R. Co. v. Cleveland, 204 U. S. 116;
51 L ed. 399.

Chicago M. & St. P. R. Co. v. Wisconsin,
238 U. S. 491; 59 L. ed. 1423.

Buchanan v. Warley, 245 U. S. 60, 74-82;
62 L. ed. 149.

Forbes Pioneer Boat Line v. Board of Coms'rs,
258 U. S. 338, 341; 66 L. ed. 647.

Pennsylvania Coal Co. v. Mahon,
260 U. S. 393, 412-416; 67 L. ed. 322.

Pierce Society of Sisters of the Holy Names,
268 U. S. 510, 533-536; 69 L. ed. 1070.

Lockner v. New York, 198 U. S. 45-76;
49 Law ed. 937;

Coppage v. Kansas, 236 U. S. 1-42; 59 Law ed. 441.

CHAPTER IV.

Section 4 of Article XI of the Oregon Constitution, quoted below, in this chapter, provides that no property may be taken by a corporation without compensation.

There is only one case in the Oregon court that has given consideration directly to that constitutional provision as applied to the riparian right, viz,—*Logan vs. Spaulding, supra.* And so we maintain that the case was controlling in the Court of Appeals. We discuss the subject under the following title:

(5) THE OREGON WATER CODE, AS CONSTRUED IN RE WATERS OF HOOD RIVER, WHICH CONSTRUCTION WAS ADOPTED IN THE APPELLATE COURT, VIOLATES SECTION 4 OF ARTICLE XI OF THE OREGON CONSTITUTION, AS CONSTRUED IN THE OREGON COURT IN LOGAN VS. SPAULDING LOGGING CO., (CITED BELOW), WHICH DECISION SHOULD HAVE BEEN FOLLOWED IN THE APPELLATE COURT.

Section 4 of Article XI of the Oregon Constitution follows:

> "§ 4 Compensation for Property Taken by Corporation. No person's property shall be taken by any corporation, under authority of law, without compensation being first made or secured in such manner as may be prescribed by law."

Logan v. Spaulding Logging Co. 100 Or. 731, 736, (190 Pac. 349), supra,

construed an Oregon Act granting franchises for using Oregon streams for log floating purposes as violative of said Section 4, Article XI, in that it impaired the vested right of the riparian proprietor on the stream affected.

It held that

> "interference with the natural flow of the stream, in so far as it injures the riparian proprietor, or interferes with his enjoyment of his right to the use of the stream, is a taking pro tanto of his property, which is governed by the constitutional provision above quoted."

CHAPTER V.

(6) OREGON WATER CODE OF 1909.

A copy of this Code consisting of its 74 sections is set forth in full at Appendix, pages 1 to 33.

So far as these provisions affect the main questions here, we are concerned with but Section 1, and Section 70, (with its eight subdivisions, pages 29-31), Section 72, providing for the exercise of the power of eminent domain, and Section 74, the Emergency Clause, designed to prevent the Act from being referred to the people under the referendum powers of the state Constitution.

In addition to these sections, there are those which provide a procedure for the adjudication of those water rights of the state *subject* to adjudication under the Code. But those provisions affect only side issues.

Section 1 provides in effect:

That subject to existing rights all waters of the state may be appropriated for beneficial use as therein provided; but that nothing therein contained shall be construed to take away or impair the vested right of any person, firm or corporation or association to any water.

Section 70 (Appx. 29), by its Subdivision 1 reiterates that nothing in the Act contained shall impair vested rights of any person, etc., and Subdivision 2 thereof, that actual application of water to a beneficial use prior to the passage of the Act by any riparian pro-

prietor shall be deemed to create in him a vested right to the extent of beneficial use, etc.

Complete Copy of Section 1, and of Section 70, Water Code

At this place it seems that it would be to the convenience of the court to set forth here Section 1, (Appx. 1) and Section 70 (Appx. 29-31) of the Water Code.

Section 1. Subject to existing rights, all waters within the State may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, or corporation, or association, to any water.

Section 70. Vested Rights Preserved.—

1. Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.

2. Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use; provided, such use has not been abandoned for a continuous period of two years.

3. And where any riparian proprietor, or under authority of any riparian proprietor or his or its predecessor in interest, any person or corporation shall, at the time this act is filed in the office of the Secretary of State, be engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use such water shall be deemed vested in such riparian proprietor; provided, such works shall be completed and said water devoted to a beneficial use within a reasonable time after the passage of this act. The Board of Control,

in the manner hereinafter provided, shall have power and authority to determine the time within which such water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the Board of Control.

4. Nor shall anything in this act contained affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined or pending prior to the taking effect of this act.

5. Nor shall the right of any person, association or corporation, to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated prior to the filing of this act in the office of the Secretary of State, and such appropriators, their heirs, successors or assigns, shall, in good faith and in compliance with laws existing at the time of filing this act in the office of the Secretary of State, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecute such work diligently and continuously to completion, but all such rights shall be adjudicated in the manner provided in this act.

6. The Board of Control shall have authority, and shall for good cause, shown upon the application of any appropriator, or user of water under an appropriation of water made prior to the passage of this act, or in the cases mentioned in subdivisions 3 and 5 of this section, where actual construction work has been commenced prior to said time or within the time provided in law existing at the time of filing this act in the office of the Secretary of State, to prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use, and in determining said time shall grant a reasonable time after the construction of the works, or canal, or ditch, used for the diversion of the water, and in doing so shall take into consideration the cost of the appropriation and application of such water to a beneficial pur-

pose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. Upon making such order the Board of Control shall direct the State Engineer to issue a certificate showing such determination. For good cause shown the Board of Control may extend the time by granting further certificates.

7. And where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof.

8. All rights granted or declared by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act. This act shall not be held to bestow upon any person, association, or corporation, any riparian rights where no such rights existed prior to the time this act takes effect.

CHAPTER VI.

The question before the court is:

(7) TO WHAT EXTENT, IF ANY, HAS THE WATER CODE AFFECTED PETITIONER'S RIPARIAN RIGHTS?

Petitioner maintains that properly construed the act has not changed or impaired these rights in the least.

But that, as construed in the decree under review here, petitioner's vested rights have been destroyed without due process of law; that they have been taken without compensation, and delivered to the respondent Cement Company, which seeks to use the same for the purposes for which the petitioner acquired them, namely: The manufacture of electrical power by the use of the waters of said stream, where it flows over and along petitioner's said lands. That the principal value in said lands arises from the natural fall of the waters of said stream thereon; that they are ideally situated for the manufacture of sufficient power to stabilize the petitioner's service of electricity alike to all consumers within the territory served. That the use of the power which nature made so easily available upon petitioner's said lands, was an inducement for the purchase and holding of said lands in connection with petitioner's lawful business as a public utility.

After the passage of the Water Code in 1909 various proceedings were instituted under the Code for the adjudication of the relative rights to the use of waters of Oregon streams. Naturally, the question arose, to what extent were vested riparian rights affected by the Code provisions?

So that in 1915, six years after the Code became effective, the Willow Creek case was decided in the Oregon court, and the Pacific Livestock case decided in this court, and based upon the Willow Creek case.

These cases so strongly established that such riparian rights as petitioner possesses were unaffected by the Code, that the fears of riparian proprietors were put at rest.

On June 15, 1920, the Oregon court decided *Logan vs. Spaulding Logging Company, supra,* (petition for rehearing, denied Feb. 15, 1921), to the effect that the common law riparian rights on the non-navigable streams in Oregon were property under the protection of Section 4 of Article XI of the Oregon Constitution, providing that property could not be taken except upon just compensation paid. And it was after that decision that petitioner acquired its lands for these power purposes.

And yet today we find ourselves here defending against a construction placed by the Appellate Court upon Subdivision 2 of Section 70 of the Code, which "abrogates" petitioner's vested rights. And this con-

struction, and the decree based thereon, is believed to have been taken from the Hood River case, which we have pointed out at pages 32-38, herein (Statement of The Case), is not applicable to the case at bar.

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The opinion of Mr. Justice Brown, specially concurring in the dissenting opinion of Mr. Justice McCourt, from ..... 256 to 259

We will set forth the references to the Pacific Livestock case, and to these Oregon cases under the following title:

CHAPTER VII.

(8) THE VARIOUS CONSTRUCTIONS PUT UPON THE PROVISIONS OF THE WATER CODE BY THE OREGON COURT AND BY THIS COURT.

We deal here with the following cases:

In Re Willow Creek, (1915)
74 Ore. 592,
(144 Pac. 505; 146 Pac. 475)

Pacific Livestock Co. vs. Lewis, (1915)
241 U. S. 440, 60 Law Ed. 1084

Re Water Rights of Hood River, (1924)
114 Or. 112;
(227 Pac. 1065)

Norwood v. Eastern Oregon Land Company,
(1924) 112 Ore. 106,
227 Pac. 1111

Logan v. Spaulding Logging Co., (1920)
100 Ore. 731, 736,
190 Pac. 349

Harris v. Southeast Portland Lumber Co., (1927)
123 Ore. 549;
262 Pac. 243.

The first two of these cases, (In Re Willow Creek), was decided in 1915, just prior to the consideration by this court of the second of the cases, (*Pacific Livestock Co. vs. Lewis*).

In both cases the constitutionality of the Act was assailed. The first, Re Willow Creek, was an ad-

judication proceeding under the Code. The respective rights of the water users concerned in that case had been determined by the State Water Board; and its Findings and Order of Determination of the respective rights had been filed in the Circuit Court, passed upon, and the decree appealed to the Supreme Court. The Oregon court on the appeal sustained the constitutionality of the Act.

We make the following quotations from the Willow Creek case, the first in determining the constitutionality of the Act. The other portions quoted are in confirmation of the common law riparian doctrine. The citation from paragraph 24 of the opinion gives the assurance that when such rights have become *vested* they cannot be taken away by legislative enactment or judicial decree.

WILLOW CREEK

6, 7. "It is claimed, also, that the act is in contravention of the constitutional provision that no person shall be deprived of his property without due process of law. This indispensable constitutional safeguard should be carefully applied and never infringed upon. If any clause of the act in question is not in consonance therewith, its effect should be eliminated, or else it should, if consistent, be given an application in conformity with the letter and spirit of the organic law. The first section of the act declares that nothing therein contained shall be so construed as to take away or impair the vested right of anyone to any water; and Section 70, subdivision 1, is to the same effect. Any appropriation of water under the provisions of the act is thereby made subject to such condi-

tion. In the absence of such legislative announcement the lawmakers have no power to destroy such a right. The main purpose of the law is to protect water rights and to promote the utilization of the same. The right to the use of water is a valuable property right guaranteed to every citizen. It cannot be arbitrarily nor unreasonably interfered with by the legislative department of the state." (Opinion 616-7) * * * * *

21. "It is said by Mr. Judge Bean, in the case of *Eastern Oregon L. Co. v. Willow River Land & Irr. Co.*, decided by the Circuit Court of the United States for the District of Oregon, November 10, 1910, 187 Fed. 466:

'The general doctrine of riparian rights is too firmly established in this state to be shaken now by judicial decision. It is useless to cite authorities. The riparian proprietor is entitled to the ordinary * * flow of a stream as long as it is of any beneficial use to him, and this may, under some circumstances, include flood or overflow waters * * to be anticipated during ordinary seasons.'" (Opinion 625)

* * * * *

22. "The nature and extent of the right of a riparian proprietor to the water of a stream for irrigation cannot be measured by any definite or fixed rule, nor can the amount of water which he is entitled to use for that purpose ordinarily be definitely determined; it being necessarily a varying quantity, depending upon the use by other proprietors, and whether its use by him will be an injury to them. The doctrine of prior appropriation and riparian rights is not so antagonistic that they may not exist in the same locality. A settler on a non-navigable stream has the election either to rely upon his rights as riparian proprietor or to make an appropriation of the water and claim as an appropriator, but he cannot do both; *Williams v. Atlnow*, 51 Or. 277, 300 (95 Pac. 200, 97 Pac. 539); *Crawford v. Hathaway*, 60 Neb. 754 (84

N. W. 271); *Crawford v. Hathaway,* 61 Neb. 317 (85 N. W. 303); *Crawford v. Hathaway,* 67 Neb. 325 (93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889)."

* * * * *

24. "In the arid and semi-arid lands of the west the early home-builders first settled upon the streams and other bodies of water. The rights of such people to a reasonable use and benefit of the water flowing over their lands which they have appropriated or used for a beneficial purpose should be carefully considered and not abrogated. Those obtaining title to land take the same subject to the laws then prevailing and defining the appurtenances thereto. When such rights have become vested, they cannot be taken away by legislative enactment nor judicial decree. Like all property they are subject to reasonable regulation." (Opinion 627).

As will be seen from the quotation, the Oregon court contented itself with the discussion of Section 1 of the Act and Subdivision 1 of Section 70 of the Act. We have discussed each of those here, and which provide:

That nothing contained in the Act shall take away or impair the vested right of any person, firm, or corporation or association to any water.

The only difference in the language of Section 1 and of Subdivision 1 of Section 70, is as has been pointed out:

That Section 1 of the Act states that nothing in the act contained shall be construed to take away or impair these rights, while the other says that

"nothing in this Act contained shall impair the vested right of any person," etc. Appx. 29.

This opinion was by Mr. Justice Henry Bean.

We next consider the decision of this court in *Pacific Livestock vs. Lewis.* This suit was brought by bill in equity in the District Court of Oregon. Among the questions raised, was, whether the Act was repugnant to the 14th Amendment of the Federal Constitution. In that case this court made a careful examination of the provisions of the Act, taking the material provisions step by step. It quoted from the Willow Creek case at page 448-9 of the U. S. Report, to this effect:

That the statute had been enacted to accelerate the development of the state, promote peace and good order, minimize the dangers from vexatious controversies, and afford a convenient way for the adjustment and recording of water rights. And that in its enactment it called "to a limited extent" into requisition, the police power of the state. From that opinion it took this language:

> " 'Water rights, like all other rights, are subject to such reasonable regulations as are essential to the general welfare, peace and good order of the citizens of the state, to the end that the use of water by one, however absolute and unqualified his right thereto, shall not be injurious to the equal enjoyment of others entitled to the equal privilege of using water from the same source, nor injurious to the rights of the public.' "

Upon a careful consideration of the Act this Court said:

"That the statute is not intended to take away or impair any vested right to any water or to its use is expressly declared in its 1st and 70th sections, 3 Lord's Oregon Laws, §§ 6594, 6595."

Section 6594, 3 Lord's Oregon Laws, there cited, corresponds to the present Section 47-402 Oregon Code Annotated 1930, and to § 1 Appx. page 1. Section 6595, 3 Lord's Oregon Laws is Section 47-403 of said Oregon Code 1930, Subdivision 1 of § 70, Appx. 29.

Both courts cited Section 1 and Subdivision 1 of Section 70, as expressing the *intention of the Legislature not to impair any vested right.*

This Court also had before it the express statement of the Oregon Court that common law riparian rights and rights by appropriation were not so antagonistic that they might not both exist in the same locality, and that a settler had a right to acquire his water rights by either method.

And there is also set forth in these quotations from the Oregon Court, the statement that when such rights have been vested they cannot be taken away by legislative act nor by judicial decree. (Par. 24, page 627).

In both opinions these assurances were, of course, accepted by this Court as having been made in good faith, and under the belief that the Oregon Court would abide thereby, in its administration of the Act. Nothing was said in the Willow Creek case to give the slightest intimation that the Act had "abrogated" those vested rights that had not been put to a beneficial use prior

to the enactment of the Code. Nor was there anything which gave notice that such a construction would subsequently be placed upon the Act, under the guise of the exercise of the police power. The Oregon court had said that both riparian rights and rights by appropriation could exist in the same locality, and that the settler had the right to make his choice between the methods of acquiring the right to use the water.

In Re the Waters of Hood River.

This is a decision by the same distinguished jurist who rendered the opinion in the Willow Creek Case.

In the Hood River case the court held that the power company claiming as a riparian owner had no water right,—at least had no riparian rights, because they had not been put to a beneficial use before the enactment of the Water Code.

And this is the method of reasoning by which that result was reached.

At page 181 of the opinion it is said:

That it was within the province of the Legislature, by the Act of 1909, to define a "vested right" of a riparian owner, or to establish a rule as to when and under what conditions and to what extent, a vested right should be deemed to be created in a riparian proprietor,—a most remarkable doctrine. The Legislature judicially determines when and under what conditions, and to what extent a vested right should be deemed to be created in a riparian proprietor. The language "deemed to be

created" was doubtless from Subdivision 2, Section 70 of the Code. That was at page 181 of the opinion. At the following page, 182, it is said:

That under our present statute DEFINING what shall constitute a vested right of a riparian proprietor, the claim of the power company as a riparian owner of land on Hood River, to a continuous flow of a specified quantity of water over its land, cannot be maintained. This was placing the decision upon a definition—again a legislative invasion of the province of the judiciary. But the language does not comport with the result in that case, which was that the company's riparian rights were destroyed. It was not even granted riparian rights which had been acquired prior to March 3rd, 1877, the date of the enactment of the Desert Land Act. It is this opinion that the Appellate Court followed in its construction of Subdivision 2 of Section 70 of the Code.

THE NORWOOD CASE

This case is said in the majority opinion in the instant case to have been decided upon the same day as the decision was rendered in the Hood River case. They were both decided in 1924. Mr. Justice Bean, who wrote the opinion in the Hood River case, filed an opinion concurring in part and dissenting in part, (112 Ore. 119). In this opinion he there said:

"The question of riparian rights is fully discussed in the several opinions

In Re Hood River,
227 Pacific, 1065, (note the page)

and it is unnecessary to further comment thereon." (The Pacific Reporter Reference for the Norwood case is 227 Pacific, 1111). So the publications of the opinions would seem to have been first, Hood River, and then, Norwood. But at any rate they were both under consideration before the same court at the same time.

In the Norwood case, page 111, the opinion states:

That the *riparian rights* of defendant company date back to 1867, when its predecessors in title acquired the ownership of the land.

At page 114 quotation is made from *Brown vs. Baker,* (cited here) to the effect that riparian rights are purely local, inseparably annexed to the land washed by the stream at the place where they border on its waters.

> "Such rights cannot be divorced from the adjacent lands."

And further, at page 116:

> "The title of the defendant, therefore, carried with it the common law riparian rights which have always been recognized in this state."

The court, at page 117, quoted from Section 1, and from Section 70, to show that the existing rights were preserved. It said that the Title of the Act so far as existing rights were concerned, limited the operation of the statute to "Determination of existing rights." That thus controlled in the title of the Act, as well as

by the terms thereof, the Legislature *could not and did not add to* or *subtract from* the *scope of existing rights.*

Quotations from this case are set forth at Appendix 71-73.

THE HARRIS CASE (1927).

The Harris case involved the flow of a non-navigable stream, and the effect of the impairment of the riparian rights thereon.

The leading case in Oregon upon that subject is *Weiss vs. Oregon Iron & Steel Co., supra.* We have quoted at length from that case at Appendix 52-6. We likewise quoted from the Harris case at Appendix 74-76.

By comparison it will be seen that the Harris case adopted in toto the common law riparian doctrine, as set forth in the Weiss case. It quoted from the Weiss case that a riparian proprietor is entitled to have the stream which washes his lands flow as it was wont by nature, without diminution or alteration; that every riparian owner of land through which a natural stream of water flows has a right to its uses as it passes his land; that he is entitled to have it flow naturally in its *accustomed* channel, without unreasonable detention or diminution, etc. And that such rights are inseparably annexed to the soil, and are part and parcel thereof; that they exist jure naturae as part of the land, and the rights will not be suspended or destroyed by mere non-

user, although they may be extinguished by adverse possession for the period of prescription.

LOGAN VS. SPAULDING LOGGING CO. (1920)

This case commonly called the "Logan Case" has been heretofore discussed, page 121-2 hereof, under the subject of the violation of the Oregon Constitution, Section 4 of Article XI, which provides that no property shall be taken by any corporation under authority of law without compensation, etc. This case held unconstitutional, a law which permitted the licensing of log floating through private riparian lands in non-navigable streams. The decision was based upon the ground that a riparian right *was vested*, and that any law that impaired it amounted to the taking of property pro tanto, in proportion to the impairment of the right. This is one of the Oregon cases, which we urge the Appellate Court should have followed. It has never been reversed, and is the law of the state today.

We have cited these cases in this order to show:

(1) That the Willow Creek case was considered by this Court in its decision of the Pacific Livestock case. A comparison of the Willow Creek opinion with that of the Hood River case will show that:

In 1915, six years after the adoption of the Code, it had *not been* discovered by the writer of the two opinions that the Legislature had intended to destroy vested riparian rights by Subdivision 2 of Section 70 of the Act. That when that discovery was announced in the

Hood River case, the court was as evenly divided as possible. That at the very time when the Hood River case was being determined, *the Norwood case was announcing the common law riparian doctrine,* for which we contend, and stating that it had always prevailed in Oregon.

February 15, 1921, the Logan case was decided. Between the dates of the decisions of those two cases, two important things happened. First, on February 15th, 1921, there came the decision of the Logan case, holding that the impairment of a riparian right violated Section 4 of Article XI of the Oregon Constitution.

Following that decision, to wit: On March 11th, 1921, petitioner acquired its lands that had been patented in 1885. Hence, at the time of the petitioner's purchase of its lands, the decision of the Willow Creek case, and the decision of this court in the Pacific Livestock case, and the decision of the Oregon court in the Logan case, were certainly controlling as to the character of petitioner's title, namely:

That its riparian rights to Rogue River were vested, and were part and parcel of the land, and under the protection of both the State, and Federal Constitutions.

Then there came the Harris case in 1928, stepping back to the year 1886 to take from the Weiss case, and re-announce the common law riparian doctrine which the Oregon court said in the Norwood case, (at the time

of the decision of the Hood River case), *had always prevailed in Oregon.*

This Court not bound to follow such conflicting decisions.

We realize that the Court would feel bound to follow the Oregon construction of the Water Code. But we know that if by so doing the result would be to take private property without due process of law, the construction of the Oregon Court would not be followed. We also believe that where the recent state decisions are so mixed and conflicting that it may be said the state has no real policy in so holding, the Federal Court can decide the case without decision of the state court. "Such decisions have not the character of established precedent declarative of the settled law of a state."

Pease v. Peck, 59 U. S. 595,
18 How. 595-601,
15 Law Ed. 518, 520. (May 14, 1855).

Illustrative of the wisdom in applying the doctrine of *Pease vs. Peck* is the 1930 decision of the Oregon court in

In Re Waters of Deschutes River,
134 Ore. 623,
286 Pac. 563,
294 Pac. 1049.

This was an adjudication proceedings under the Water Code. There were several claimants who appeal-

ed from the decree of the Circuit Court. Of these the Columbia-Deschutes Power Company was the principal appellant, being most seriously affected by the decree. Its appeal was dismissed here as taken too late, (290 U. S. 590, (1933). Its modified opinion is dated December 30, 1930, 134 Ore. 623.

The Columbia-Deschutes Power Company, (which we will call the Deschutes Company), claimed as a riparian proprietor, the right to use and appropriate 8,000 cubic feet per second of the waters of the Deschutes River for power purposes. (Opinion 691). Its claim was filed January 7th, 1924; the details thereof are at the opinion 685-689. The matter is covered in the opinion by paragraphs 45, 46, pages 703-4. It is there stated that the Deschutes Company had stipulated and waived its right in favor of all claimants and appropriators on the river *above* its proposed location of its power plant.

In the original opinion the Deschutes Company was decreed 8,000 cubic feet per second for power with a priority of January 5, 1924. (The date undoubtedly referring to the date of the filing of the claim).

In that case the opinion quotes the opinion in

Caviness vs. La Grande Irrigation Co.,
60 Ore. 410 at 421,
(119 Pac. 731).

The opinion in the quoted case is by Mr. Justice Burnett, who dissented in the Hood River case, and

was the author of the opinion in the Norwood case.

The quotation is found in the Deschutes case at 692 to this effect:

An appropriator, subject to the rights in existence at the time that his appropriation is made, may take all of the water that he can reasonably use without waste for a beneficial purpose, although it be the lion's share. But a riparian owner using water in that capacity is in a sense always a tenant in common with other riparian owners whose rights, at least for irrigation, he is bound not materially to injure by his riparian use. That the appropriator is always a tenant in severalty owing no duty or respect to those endeavoring to use the water by title subsequent to his. That in the very nature of things the court cannot fix in advance by decree what quantity of water will be reasonable for the future use of a riparian proprietor claiming the duty of water in that character. The Deschutes opinion italicizes this last statement. That concerning mere diversion and use there is no difference between the non-riparian appropriator and the riparian user, provided the former has a lawful access for that purpose to the stream from which the diversion is made.

Again, at 704, the Deschutes opinion states (paragraphs 47, 48), that where the old riparian system prevails, a riparian owner using water in that capacity is in effect always a tenant in common with other riparian owners of the stream, and the amount to

which he is entitled varies with the reasonable demands of the other riparian proprietors.

At paragraph 49, page 706, it is stated:

The statute (Code) recognizes no difference as to the right of water to be used for irrigation, from water to be used for power purposes, in so far as it relates to the protection of such rights. That such uses should be and are protected under the statute.

What now becomes, in the light of this opinion, of the doctrine of the Hood River case, as construed by the Appellate Court to the effect that the riparian proprietor, who had not at the enactment of the Code beneficially used the water, lost his riparian rights?

The Hood River case and the majority opinion in the Appellate Court beg the question and avoid the issue by referring to the riparian right as the doctrine of continuous flow. This, to an extent, clouds the issue, particularly in the instant case, where the right is in effect completely "abrogated."

The majority opinion in this case quoted the Hood River case to the effect that by the terms of the Water Code the riparian proprietor's

> "usufructory privileges were not destroyed; his right of access to and to the equal use of the waters for ordinary domestic purposes were preserved. Re Water Rights of Hood River, 114 Oregon at 190." (R. 449, 73 Fed. (2d) 568).

But the prevailing opinion terminates at page 188. At 190 we find the opinion of Mr. Chief Justice Mc-

Bride, specially concurring, and the reference is doubtless made to this concurring opinion. And the statement has reference to that *portion* of the concurring opinion which deals with the subject of "riparian rights," and *not* with the subject of the Water Code, or its relation thereto. At 190 it is in substance said:

That riparian rights to water may be divided into two classes—natural uses and others deemed extraordinary.

> "Natural uses, which I deem to be those that vest in a riparian proprietor at the very moment that he obtains title to land bordering on a natural stream,"

include water for domestic, home, farm, drinking, washing, cooking, or for stock purposes. They might well be construed to extend to all culinary household purposes, watering of gardens and, as far as irrigation is concerned, watering of small gardens, is about the extent of the use of common law.

At least our interpretation of the concurring opinion does not justify the inference that the 1909 Water Code contains any preservation of any rights whatever to the riparian owner who had not used the water prior to the enactment.

But the trouble comes, when in order to reach a conclusion as in the Hood River case, a court steps beyond the rules of statutory construction, and reads things into the statute particularly helpful to the case. Hence, "bad cases make bad laws." Try as we will, we can

find in the Water Code not a syllable designed to protect the riparian proprietor in satisfying his thirst for a drink, as against the greed of an appropriator who would take it all. The vice comes in the *construction* of the Water Code.

Neither in its title nor in the body of the Act, is there language capable of being interpreted as destroying riparian rights which had not been beneficially used before the Act. The nearest approach to such language is to be found in Subdivision 2 of Section 70, used in the Hood River case, from which to deduce the construction that riparian rights unused at the time of the enactment were "abrogated." That language is in effect, that actual application of water to a beneficial use prior to the enactment, by a riparian owner, *creates* in him a vested right to the extent of the actual beneficial use. Who will read into that language the further statement that the time-honored riparian doctrine was "abrogated" thereby? Who will apply the doctrine of appropriation, which required beneficial use, to the riparian doctrine, which did not require beneficial, or any use, (the riparian right being one which cannot be gained by user nor lost by nonuser)?

Logan vs. Spaulding Logging Co., supra, is the only Oregon case, so far as we know, construing Section 4 of Article XI with reference to the impairment of the riparian right. It was not overruled in the Hood River case, nor in the Deschutes case. In the Hood River

case it was cited in support of the statement that the riparian rule could be applied as to riparian owners involving the floating of logs, etc. It has never been overruled, and we maintain it is the law today. We urge that the Appellate Court should have applied it as the controlling decision of the Oregon court upon the impairment of the riparian right. It was so applied in the dissenting opinion here. We believe that the Federal Court should follow the Oregon case in the application of the Oregon Constitution protecting riparian rights from the operation of the Water Code, as so erroneously construed in the Hood River case.

We believe that such construction, if it causes the provision to violate the Federal Constitution, will not be followed in the Federal Court.

The state court held the Water Code to be constitutional in Re Willow Creek, supra, but this was based upon a citation of Section 1 of the Code, and Subdivision 1 of Section 70 of the Code. It also was connected with the announcement that riparian rights were vested and could not be disturbed by legislation or judicial decree.

This court has said that it will follow the state court in determining that a state law does not violate the state constitution.

Louisville Gas & E. Co. vs. Coleman,
277 U. S. 32-54,
72 Law Ed. 770 (1927).

Referring particularly to the U. S. Report, page 36.

But it also there held, that it is not bound by the finding of the state court as to whether the statute violates the "Equal Protection Clause" of the 14th Amendment.

But without reference to *Logan vs. Spaulding L. Co.* (supra), upon the constitutionality of the Water Code under the *Oregon* Constitution, the state court in the Hood River case has now construed the Code so as to make applicable *Logan vs. Spaulding* to the effect that an impairment of a riparian right is in violation of Section 4 of Article XI of the State Constitution.

Hence, we maintain that the Logan case was and is controlling and should have been followed in the Appellate Court.

CHAPTER VIII.

This chapter deals further with the construction of the Water Code under the following title:

(9) THE EXPRESSED PURPOSE OF THE WATER CODE. THE COURTS IN CONSTRUING STATE STATUTES GIVE GREAT WEIGHT AND CONSIDERATION TO THE TITLE OF THE ACT.

The Oregon Constitution, Article IV, Section 20 reads:

Oregon Code, 1930, Volume I, page 108:

Subject and Title of Act.

"§ 20. Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Examining the title, the Act provides a system for regulation, control, disposition, use and right to the use of water. The rest of the title has to do with determining *existing rights* thereto, provides penalties for violation, and appropriates money and declares an emergency.

Does that portion of an Act which destroys a riparian right come under the terms of the Act? Is the destruction of the right, *a regulation and control,* or does it

have to do with the distribution, use or right to use property? It may be said to have to do with the right to use water, because it destroys the right to use. But we think that the term "the right to the use of the water" must be construed with the terms "regulation, control, distribution and use." Had the Act been entitled one to *modify* the common law riparian doctrine, and henceforth deny some riparian proprietors the right to the use of the waters on which their lands border, would the meaning have been the same as that conveyed in the existing title to the Act? This raises the question, if not, —whether the Act would have been passed; whether an emergency clause denying the referendum would have been tolerated.

Section 1 permits all waters of the state to be appropriated for beneficial use *"subject to existing rights,"* and every permit issued by the State Engineer, including those involved in this case, reads, that the appropriations are "subject to existing rights." At least, all that we have seen, so read. But if they do not so read they do not comply with the terms of the Act.

An Appropriation.

What is the effect of a water appropriation—what are its attributes?

As the name implies, the appropriator takes something to himself, but he cannot legally do this if it is the property of another. Hence, the appropriate language in Section 1 of the Code:

> "Subject to existing rights all waters within the state may be appropriated for beneficial use. * * * but nothing herein contained shall be construed as to take away or impair the vested right of any person, firm or corporation or association to any water."

The petitioner maintains that it is in this class, it is a person, it is a corporation, and the taking of its property *is forbidden by the terms of Section* 1.

This question then follows:

Is Section 1 altered or changed by any other provision of the Act? No other section deals with the same subject except Section 70. Did the Legislature by that section intend to change the provisions of Section 1? Section 70 answers that question. Subdivision 1 thereof (Brief, page 124).

> "Nothing in this Act contained shall impair the vested right of any person, association or corporation to the use of the water."

Section 1 of the Act reads:

> "but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, or corporation, or association, to any water." (Brief, page 124).

Observe that the difference is in the wording only. Subdivision 1 of Section 70 omits the words

> "but nothing herein contained shall be so *construed* as to take away or"

making Section 1 to read:

> "Nothing in this act contained shall impair the vested right of any person," etc.

Is it now to be "*so construed* as to take away" vested rights, guarded by Subdivision ONE? So petitioner finds its property saved to it by the terms of both Section 1 at the beginning of the Act, and Section 70 at its close.

But in the Hood River case, fifteen years after the enactment of the statute, it was *discovered* that the Legislature *had intentionally done away with Subdivision* 1 of Section 70, and done away with Section 1 of the Act in this language:

(Subdivision 2 of Section 70, Appx. 29-30):

> "Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to *create* in such riparian proprietor a vested right to the extent of the actual application to beneficial use; provided, such use has not been abandoned for a continuous period of two years."

This language, interpreted as it reads, seems to mean to say that an actual beneficial use of water before the enactment, by a riparian proprietor, is *deemed*, that is, held or determined, to create in the riparian proprietor a vested right to the extent of the actual use. Stripped of its verbage, it means that the riparian proprietor is deemed to be an appropriator to the extent of the actual application and use of the water at the date of the Act. This can amount to nothing but a classification of his right. The attributes of an appropriation are different from those of a riparian right. But by putting him who

had used his riparian right, in the class of an appropriator, he becomes subject to the terms of the Act relating to appropriators, and falls under the same regulations as are provided for appropriators. To us it seems that Subdivision 2 *affects only the riparian who had then* applied the water to a beneficial use. We cannot read anything into the Act. It does not contain anything applying to one who had not so used the water beneficially. It merely crowns, as an appropriator, the riparian who had beneficially used some water prior to the enactment.

Can anyone find in this language of Subdivision 2 a word or a phrase to justify the Oregon Court in *Re Hood River* in saying, as is now contended, that the Legislature destroyed the unused vested rights by this so-called *definition.* It is said that it defines the vested riparian right as one which had been used before the passage of the Act. *But it does not do anything of the kind.* It says that such beneficial use *shall be deemed to create* a vested right to the extent of the actual application to a beneficial use. This is splendid language with which to define an appropriation.

CHAPTER IX.

(10) THE EMINENT DOMAIN CLAUSE OF THE WATER CODE, SECTION 72.

The 1909 Legislature in its efforts to enact a statute that would respect the rights guaranteed by the Federal Constitution, and yet provide a system that would permit waters, water rights and property of every kind needed for public use, to be taken and applied therefor, added to the Water Code, Section 72, providing the right of eminent domain therefor. (Appx. 32).

This provision grants not only to the United States and the State of Oregon, but to any person, foreign or domestic corporation or association, the right of eminent domain to acquire for public use any property or rights then or thereafter existing when found necessary "for the application of water to beneficial uses" and to use such property, if necessary, "in common with the former owner." It also allows condemnation of rights to conduct water from and over the lands of another for public uses, including the right to raise water by means of dams, reservoirs, etc., to make it available for the use intended.

This provided the constitutional way in which to acquire vested riparian rights, or any other property right, for public purposes. Of course, whether the use is public or not is a matter for the courts to decide, and so the Oregon court has held. Such procedure would give

due process of law and provide compensation for property taken.

In seeking to determine whether it was the intention of the Legislature to unconstitutionally destroy vested riparian rights for the general good of the public, or for any public use, we cannot disregard the well-known canons of statutory construction which require the consideration of the act as a whole. In applying such rules of construction we necessarily step down from Subdivision 2 of Section 70 and construe the "Eminent Domain Clause" in connection therewith.

OTHER EMINENT DOMAIN STATUTES OF THE 1909 SESSION.

To further show the unsoundness of the construction attempted to be put upon Subdivision 70 of the Water Code, we cite:

Chapter 75, Oregon Laws of 1909, pages 132-4.

At the time that the 1909 Legislature was passing the Water Code, Chapter 1 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon, Volume 2, page 1603-4, etc., provided for the appropriation of water for general use and irrigation.

The first section in the chapter was the Code Section 4993, followed by Section 4994, with which we are concerned.

Section 4993 declared the use of the waters of the lakes and running streams for general rental, sales and

distribution purposes for supplying irrigation waters, etc., to be a public use.

Section 4994 of the B. & C. Code granted to corporations, organized for the construction, etc., of canals for general irrigation purposes and other purposes, the right to appropriate and divert water from natural stream beds and channels, and that it may

> "condemn right of way for its ditch, or canal or flume, and may condemn the rights of *riparian proprietors upon the lake or stream from which such appropriation is made,* upon complying with the terms of this act."

It followed with further rights to condemn reservoirs, cites for storage, etc.

The 1909 Legislature by Chapter 75, page 132-4, of the 1909 Session Laws, amended said Section 4994 as follows:

> "Sec. 4994. A corporation organized for the construction and maintenance of a ditch or canal or flume for general irrigation purposes, and other purposes above described, may appropriate and divert water from its natural bed or channel, and condemn right of way for its ditch, or canal, or flume, *and may condemn the rights of riparian proprietors upon the lake or stream upon which such appropriation is made, upon complying with the terms of this act.*"

The Act by Section 3, page 133-4, amended Section 5075 of said B. & C. Code, (as it had been amended in 1907), so as to provide among other things as follows:

> "And any such corporation mentioned in Section 5074 (public service corporation) may also appro-

priate and *condemn the rights of riparian proprietors in any* lake or stream, to enable such corporation to develop, manufacture, or furnish electrical energy for lighting or power purposes, for the operation of any railway in this State, or to manufacture, furnish, or sell electrical energy for lighting or power purposes to any city or town in this State, or to any public service corporation doing business therein;"

This Section (B. and C.) 5075 is now without change Section 37-102 Oregon Code 1930.

This act contained no emergency clause, and therefore, went into effect at the expiration of ninety days following the adjournment of the 1909 Session, and it adjourned on February 20, 1909.

So that by its own act, intentionally made so as to take effect *after* the effective date of the Water Code, the Legislature expressly provided for the condemnation of these vested riparian rights for public purposes. The emergency recited in the "Emergency Clause" of the Water Code, did not exist in this act. The things imminent to be done according to that *emergency clause,* were to determine the vexatious controversies arising out of conflicting water right claims. This accomplished immediately by the "Emergency Clause," left the way open to condemn existing riparian rights, and take them constitutionally for public good and public use.

And with reference to the adjudication and determination of existing rights, Subdivision 8 of Section 70

of the Water Code (Appx. 31) provides as follows:

> "8. All rights *granted or declared* by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act."

Thus it is clear *that the only rights to be adjudicated* were those *granted* by Section 1 of the Act, (appropriations), or "*declared* by this Act" (prior appropriations or riparian rights used prior to the adoption of the Act), and these, only to the extent of their prior use. Such riparian rights were there made subject to being completed in accordance with the provisions of Subdivision 3 of Section 70.

There was no occasion to adjudicate the vested riparian right that by law accompanied the lands patented prior to the enactment of the Water Code. For the Oregon court said it "accompanies the ownership of riparian lands," in the adjudication *In Re Sucker Creek* (Appx. 67). A ministerial board could not well determine or adjudicate land titles nor undertake to separate riparian rights therefrom, such being part and parcel of the realty.

At that 1909 Session there was also passed Chapter 221, (quoted at Appx. 70). As elsewhere explained it declared all waters within the state from all sources of water supply to belong to the public. And it required water appropriated to develop power to be subject to the payment of certain fees therein provided for.

Will one calmly enter upon the task of construing the Water Code without a reference to or a consideration

of, these two additional acts passed at the same session? Inasmuch as they are upon the same general subject, must they not be read in connection with the Water Code? Do they not have an important bearing upon the intention and purposes of the Legislature in enacting the Code?

And will it then be presumed (without anything in the Code to justify it) that the Legislature intended to destroy petitioner's vested riparian rights, and yet grant the power of eminent domain to take such rights for public use?

These acts considered together leave no reasonable ground for an assumption, or for even a guess, that the Legislature found it necessary to, and did use, the police power of the state to *abrogate,* (without due or any process of law), such vested riparian rights as those which the petitioner is defending herein.

The first section of said Chapter 221 of the 1909 Laws provides

> "All water within the state from all sources of water supply belong to the public."

Section 1 of the Code provides for appropriations made in accordance with the Code *and not otherwise,* and that they are subject to existing rights.

The effect of these two acts was, therefore, to cut off the riparian doctrine as applicable to lands patented *subsequent* to the enactment of the Code; and to adjudicate the unknown or disputed rights, there being no oc-

casion to adjudicate the riparian rights which *accompanied* the lands riparian to the stream.

The effect of such legislation could not impair the riparian rights which vested prior to the enactment of the Code. For as was said by Chief Justice Marshall here in 1817,

> "It will be admitted that a right once vested does not require, for its preservation, the continued existence of the power by which it was acquired."

Chirac vs. The Lessee of Chirac,
2nd Wheaton at 277,
4th Law Ed. 234.
(Quotation from 239).

The sound principles of Marshall found crystallization in Section 1 of the 14th Amendment to our Federal Constitution.

Where the intent of a statute is plainly expressed in its language, such intent will be followed without further inquiry. There is no safer or better settled canon of interpretation than when the language is clear and unambiguous, it must be held to mean what it expresses.

Lewis' Sutherland Statutory Construction,
2nd Ed.
Section 367 (238).

The language of the Water Code plainly expresses the subjects to be dealt with and the intention which the legislature sought to express. We are not unmindful that this court would be disposed to follow the construction of the Oregon court upon an Oregon statute. We

are not advised as to how far this court would follow a construction that arises, not from any words in the statute, but from reading provisions into the statute. But, be this all as it may, this court certainly cannot by construction be led to the approval of a statute thereby made to violate the Federal Constitution. The court would perhaps prefer to determine the meaning of the section itself than to find that the act as construed, but not as drawn, violates the Constitution.

The entire statute must be considered in ascertaining the intent.

Lewis' Sutherland, Section 368 (239).

Here the text states that the practical inquiry is usually what the particular provision or clause or word means; that to answer it one must proceed as he would with any other composition—construe it with reference to the leading idea or purpose of the whole instrument; that a statute is passed as a whole and not in parts or sections; it is animated by one general purpose and intent. Consequently one particular part or section should be construed in connection with every other part or section so as to produce a harmonious whole. The intention of the whole act will control the interpretation of the parts thereof.

Lewis' Sutherland, Section 370 (241).

The text is to the effect that words and clauses in different parts of the statute must be read in a sense

which harmonizes with the subject matter and general purpose of the act; that the intention of the act involves consideration of the subject matter, and the change in, or in addition to, the law which it proposes. "Hence the supreme importance of the rule that the statute must be construed with reference to its general purpose and aim."

CHAPTER X.

(11) ADJUDICATIONS PROVIDED FOR.

The title of the Act reads:

> "Providing a system for the regulation, control, disposition, use and right to the use of water, *and for the determination of existing rights thereto,*" etc.

Subdivision 8 of Section 70, as far as concerns the title, reads:

> "8. All rights *granted* or *declared* by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act."

Subdivision 8 refers back to the title. The title is required to embrace all that is in Section 8, and "all matters properly connected therewith." The matters properly connected therewith are expressed in Subdivision 8, as just set forth above. They are the rights that have been *granted* in the Act, or that have been *declared* in the Act. So far as the question here is concerned, this could only relate to the provisions of Section 1 of the Act, allowing an appropriation subject to existing rights, or to Subdivision 2 of Section 70, providing that actual application of water prior to the Act shall be *deemed to create* a vested right to the extent of application to a beneficial use.

Did the Legislature intend to preserve enough of the riparian rights *that had not been used* before the passage of the Act, *to be adjudicated* under the Act? Such

vested rights as those of the petitioner seem to have been consumed. Hence, the question:

Was it contemplated that riparian proprietors who had not so used their riparian rights, should be served with process? Was it contemplated that such rights should be adjudicated, or the subject of adjudication? Was anything contemplated except that the adjudication should by decree, as well as legislative act, wipe them out of existence? We mean the Act, as construed in *Re Hood River,* and as that case is followed in the majority opinion of the Appellate Court in this case. A proper answer to these several questions would cause one to again read Section 1 of the 14th Amendment.

No matter to what extent the Federal Court may feel bound to adopt the construction of the State Court, construing a statute of its own state, nevertheless it will never adopt a state construction which causes the Act to be construed so that in its operation it violates the Constitution of the United States, when it can be construed in harmony therewith.

Statutes must be interpreted if possible so as to make them consistent with the Constitution and the paramount law.

Herman Presser, Plaintiff in Error, vs.
People of the State of Illinois.
116 U. S. 252,
29 Law Ed. 615.

That construction of a statute should be adopted which, without doing violence to the fair meaning of the

words used, brings it into harmony with the Constitution.

Board of Supervisors of Granada County vs. Brown et al,
112 U. S. 261-273,
28 Law Ed. 704-8.

The title of an act may be resorted to, to aid in its construction if ambiguity exists.

The Coosaw Mining Company vs. The State of South Carolina et al,
144 U. S. 550-567,
36 Law Ed. 537-544.

We think that no ambiguity exists. But should it be thought to exist, this title to the Water Code will be helpful as showing that it does not contain anything relating to the impairment or limitation of riparian rights, being an Act providing a system for the regulation, control, distribution and use, and right to the use of water, and for the determination of existing rights thereto, etc.

CHAPTER XI.

Was it within the province of the Legislature to effectively declare what constituted vested riparian rights?

The Hood River case declared that it was within the power of the Legislature so to do. We maintain that the Legislature may declare what the law shall be in the future. But that if it presumes to declare the law as of the date of the enactment, it invades the province of the judiciary, and its definition of a vested riparian right should be disregarded by the courts.

We discuss that subject under the title

(12) LEGISLATIVE AND JUDICIARY POWERS. IF IN THE WATER CODE THE LEGISLATURE DEFINED WHAT THEN CONSTITUTED THE VESTED RIGHT OF RIPARIAN OWNERS, IT INVADED THE PROVINCE OF THE JUDICIARY, AND ITS ACTION MUST BE DISREGARDED BY THE COURT.

The Oregon Court in

Re Water Rights of Hood River,
114 Or. 112, (227 Pac. 1065) (1924)

at page 181 said:

> "It was within the province of the legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and

> under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor." (here follow citations of *Kansas v. Colorado,* and numerous other cases, none of which, we believe, support the text).

Of course the legislature can define for the future what shall constitute a vested right, but it cannot destroy vested rights existing at the time of the legislative declaration, nor do we think authorities can be found to support such a doctrine.

The opinion in the Hood River case applied this definition, and thereby destroyed the vested rights of a riparian proprietor whose lands were granted prior to the enactment of the Desert Land Act of March 3, 1877.

We quote from page 182 of the opinion:

> "Under our present statute, *defining* what shall constitute a *vested right* of a riparian proprietor, the claim of the Pacific Power & Light Company as a riparian owner of land on Hood River to a continuous flow of the specified quantity of water over its land cannot be maintained."

Cooley's Constitutional Limitations, Seventh Edition, Chapter V, pages 134-137:

> "DECLARATORY STATUTES.
>
> Legislation is either introductory of new rules, or it is declaratory of existing rules. 'A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law, or the meaning of another statute, and which declares what it is and ever has been.' Such a statute, therefore, is always in a certain sense retrospective; because it assumes to determine what the law was be-

fore it was passed; and as a declaratory statute is important only in those cases where doubts have already arisen, the statute, when passed, may be found to declare the law to be different from what it has already been adjudged to be by the courts. Thus Mr. Fox's Libel Act declared that, by the law of England, juries were judges of the law in prosecutions for libel; it did not purport to introduce a new rule, but to declare a rule already and always in force. Yet previous to the passage of this act the courts had repeatedly held that the jury in these cases were only to pass upon the fact of publication and the truth of the innuendoes; and whether the publication was libelous or not was a question of law which addressed itself exclusively to the court. It would appear, therefore, that the legislature declared the law to be what the courts had declared it was not. So in the State of New York, after the courts had held that insurance companies were taxable to a certain extent under an existing statute, the legislature passed another act, declaring that such companies were only taxable at a certain other rate; and it was thereby declared that such was the intention and true construction of the original statute. In these cases it will be perceived that the courts, in the due exercise of their authority as interpreters of the laws, have declared what the rule established by the common law or by statute is, and that the legislature has then interposed, put its own construction upon the existing law, and in effect declared the judicial interpretation to be unfounded and unwarrantable. The courts in these cases have clearly kept within the proper limits of their jurisdiction, and if they have erred, the error has been one of judgment only, and has not extended to usurpation of power. Was the legislature also within the limits of its authority when it passed the declaratory statute?

The decision of this question must depend perhaps upon the purpose which was in the mind of the legislature in passing the declaratory statute;

whether the design was to give to the rule now declared a retrospective operation, or, on the other hand, merely to establish a construction of the doubtful law for the determination of cases that may arise in the future. It is always competent to change an existing law by a declaratory statute; *and where the statute* is only to operate *upon future cases*, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts.

As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. 'To declare what the law, *is*, or *has been* is a judicial power; to declare what the law *shall be*, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial.' If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment."

This is the doctrine of the Oregon Court as announced in

Macartney v. Shipherd, 60 Or. 133-143, (117 Pac. 814) (1911) (Appx. 109)

In this case, the Oregon Court quoted the language of Judge Cooley, supra, as used by the Supreme Court of Virginia, —

> "To declare what the law is or has been, is judicial power; to declare what the law shall be, is legislative."

The Oregon case cited with approval:

Thomas v. Portland, 40 Or. 50,
(66 Pac. 439).

Both of these Oregon cases lay down the doctrine that legislative acts which are declaratory of the existing law are plainly invasions of the judicial power by the legislative assembly and are not controlling. We quote at length from *Macartney v. Shipherd, supra,* at Appx. 109-111.

That case was cited and followed by the Oregon Court in a decision of February 16, 1933:

Roles Shingle Co. v. Bergerson, et al.,
142 Or. 131; (19 Pac. (2d) 94).

As we have heretofore abundantly shown, acts which declare and announce the existing law, are universally held to operate upon future transactions; they cannot operate retrospectively, without invading the judiciary, and perhaps violating constitutional guarantees.

The foregoing is in harmony with the doctrine of this court as expressed in the

Sinking Fund Cases,
99 U. S. 700, 761,
25 Law Ed. 496.

We quote from the 99 U. S. at page 761:

> "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

The foregoing case was cited with approval by the Supreme Court of California in

East Bay Municipal Utility Dist. v. Department of Public Works et al,
35 Pac. (2d), 1027 (1934).

CHAPTER XII.

Was the majority opinion herein correct in assuming that the "Emergency Clause" to the Water Code was affixed thereto for the purpose of declaring that the Act was the exercise of the police power of the state? We think not. We believe that the conclusion is erroneous. However, without an understanding of the office which the "Emergency Clause" fills in the Referendum Amendment to the Oregon Constitution, the court's conclusion was to have been expected. Early after the passage of the Referendum Amendment it became necessary, in the interpretation of legislative acts, to define the office of the "Emergency Clause" as it was defined in the Kadderly case. The Act upon which it is used may or may not be the exercise of police power, because its only purpose is to prevent a referendum of the Act to the people.

We discuss the subject under the following title:

(13) EMERGENCY CLAUSE — THE 1909 WATER CODE.

The majority opinion herein cites the "Emergency Clause" at the foot of the Water Code, Section 74, (Appx. 33). It is there said:

> "The Oregon Water Code of 1909 itself purported to be an exercise of the police power of the state, as shown by Section 74." (R. 443-4; 73 F. (2d) 567).

In 1902 the Oregon Constitution was amended by the addition of the referendum provision, under which legislative acts were made subject to approval by the people. But the amendment excepted from the provision of the referendum, laws necessary for the immediate preservation of the public peace, health or safety. The amendment is set forth at Appendix 34-5.

In 1903 that amendment was construed by the Oregon court in

Kadderly vs. Portland, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222. (Dec. 1903).

The opinion in that case is comprehensive and decisive, and construed the emergency clause as follows:

That as to laws necessary for the immediate preservation of the public peace, health and safety, the action of the legislative and executive departments is conclusive and final, so far as the enactment is concerned. No power is reserved to the people to approve or disapprove them, (App. 36); That the police power is limited to the imposition of restraints and burdens on persons and property, in order to secure the general comfort, health and prosperity of the state. But that the language of the referendum amendment is broader, and includes all laws of whatever kind necessary for the immediate preservation of the public peace, health or safety, whether they impose restraints on persons and property, or come strictly within the police power, or not. That the laws excepted from the operation of the amendment, do not depend alone upon their *character*,

but upon the necessity of their enactment, in order to accomplish certain purposes; that as to such laws the amendment does not in any way abridge or restrict the power of the Legislature, *which by the insertion of a proper emergency clause,* may unquestionably *cause them to go into effect upon approval by the Governor.* That as the Legislature may exercise this power when a measure is in fact necessary for the purposes stated, and as the amendment does not declare what shall be deemed laws of the character indicated, who is to decide whether a specific Act may or may not be necessary for the purpose?,—answering the Legislature. (Appx. 36-7). We commend the quotation made in the appendix as of value here.

Cameron vs. Stevens, 121 Ore. 538 (1927), 256 Pac. 395 (Appx. 38).

holds that the effect of an emergency clause upon an Act is to cause it to become effective upon approval by the Governor, and to prevent its *not* going into effect until after the expiration of the period otherwise prescribed by the Constitution, (Sec. 28, Art. IV Oregon Constitution, Ore. Code 1930, page 120, Appx. 35).

Colorado, Arizona and Ohio took their referendum amendments from Oregon, or largely so, and all followed the construction put on the emergency clause thereof, in the Kadderly case. Decisions of these courts with references to their statutes are to be found at Appendix 39-40.

So we urge this point:

That the "Emergency Clause" to the 1909 Water Code *cannot* be said to indicate the intention of the Legislature, to declare the entire Act, the exercise of the police power, as claimed in the opinion, (73 F. (2d) (567, R. 443). Under the referendum amendment, laws declared in the Act to be necessary for the purposes specified, cannot be referred to the people.

We do not say but what the 1909 Act was to a limited extent the exercise of the police power. This Court so interpreted the decision of the Oregon court *In Re Willow Creek, (Pacific Livestock Co. vs. Lewis* cited below).

The Act did appoint a board to take charge of certain regulations of the use of the waters in the Oregon streams. And it did make the decision of the Water Board in Adjudications, effective (unless a stay bond were filed), until the decision could be reviewed by the Circuit Court to which it was referred.

But it took fifteen years following the enactment of the Code, for the Oregon court to *discover,* if indeed it did discover it, that Section 70, *by the use of the police power,* so intended to, and did, destroy the vested rights of the riparian owner, who, holding them as he had a right to do, had not as yet beneficially used them, when the Act became effective. As originally drawn this Water Code was Senate Bill Number 77, "A Bill for an Act to regulate, control and distribute water, and right

to use same." (1909 Senate Journal, page 95). It was introduced January 20, 1909. As originally drawn it did not have *this* Section 70. This did not come until nearly the close of the Session, February 11, 1909. (Senate Journal 449-51). With this Amendment there also then came Section 72, the "Eminent Domain" clause, and, if you please, Section 74, the "Emergency Clause," (Senate Journal 452-3).

We realize that courts seek the intention of the legislature in the construction of an Act, and we believe it may fairly be said that one who reads Section 1 and Section 70, (with its eight subdivisions), would at once come to the conclusion that was reached by this Court in the Pacific Livestock case, that it was not the intention of the Legislature to destroy any vested right in the use of the waters of any stream, whether or not the right had been used at the time of the enactment. By the terms of the Act, as it was introduced, it did not purport to make a distinction between riparian rights that had been used, and those that had not been used.

CHAPTER XIII.

There was what purported to be an adjudication of the waters of the Rogue River, Defendants' Exhibit "O" (R. 294), of date April 26, 1919. It was not pled as an estoppel, nor as an adjudication of any rights, nor to debar the rights of any of the parties here. It had no probative value to establish any fact in this case.

Lest its presence in the record might confuse, we discuss it briefly so far as concerns the issues.

(14) THE ROGUE RIVER ADJUDICATION.

This purports to be an adjudication of the rights of Rogue River, had under the 1909 Water Code. A certified copy of the decree is Defendants (Respondent's) Exhibit "O". (This document is in pamphlet form). It was offered in evidence by the defendants (respondents); objections were made to its introduction, and it was received under the condition that the court would take the objections under advisement. Apparently the objections were not passed upon (R. 294). The record recites certain provisions therefrom. They are to be found in paragraph IV at R. 295-6, and following. At Appx. 99-100, we set out from R. 295-6 the provisions of the decree with reference to the service of process. It is a recital that although certain water users had been served, they had failed and neglected to appear, or to submit or offer any proof of any right, title, interest, or claim in or to the use of, or the waters, or

flow of the waters of the river or its tributaries, involved in the proceeding. It contained an adjudication that they were in default, and not entitled to any right, title or interest in the water; and that they did not have any riparian rights therein, and that each of those so listed were forever barred and estopped from asserting any rights to the use of Rogue River or its tributaries. Following this in the record is a long list of names alphabetically arranged to which the above finding applies. The record then shows:

> "The names of the following companies or corporations do not appear in said list of parties served, and against whom default was entered, as stated in Paragraph IV."

There is then listed the names of six corporations. Among these there is the name of the petitioner. There is also the name of another company of a similar name, which was a predecessor of the petitioner in the ownership of these lands. There is also the name of Condor Water and Power Company, which the record shows at one time was the owner of petitioner's property.

The record does not show that the petitioner was ever served with process in said cause. In fact, petitioner was not in existence at the institution of the cause. Petitioner was incorporated in the year 1920. (The Bill of Complaint, Paragraph I (R. 5), admitted in the Answer, Paragraph I (R. 21).

The decree was not pled in estoppel. If petitioner had been a party thereto, the answer would have pled

the decree in estoppel against petitioner's contentions. The significant fact is, that the owner of petitioner's lands, at the time of the adjudication, was not served. We account for this in the language of the Water Code. Subdivision 8, (Appx. 31) of Section 70 (Appx. 29). reads:

> "8. All rights *granted* or *declared by* this act *shall be adjudicated* and determined in the manner and by the tribunals as provided in this act. This act shall not be held to bestow upon any person, association, or corporation, any riparian rights where no such rights existed prior to the time this act takes effect."

We believe that the language of this Subdivision 8 was responsible for serving only those riparian proprietors whose lands showed ditches, dams, or other works for the use of the water. At least, we interpret the language just quoted from the decree, as to service of process, to mean just that.

The language of the decree, in effect, is that the following named persons, etc., although duly and regularly notified, etc., have failed to appear and submit any proof of any rights, etc., to the use of the waters or to the flow of the waters of Rogue River, etc., are in default,

> "and are not entitled to any right, title, or interest in or to the waters involved in these proceedings, nor any part thereof, nor to any riparian rights, rights by appropriation or prescription or otherwise in respect to the diversion or use of said waters," etc.

The paragraph certainly furnishes no reason to believe that the then owner of petitioner's land was served with process.

The law covering this situation is very plain and definite, indeed. The section providing for the service, and for appearances in the proceedings was construed by the Oregon Court In Re Willow Creek. That decision holds that the Code section precludes the making of a decree or determination binding and conclusive upon any not served with notice. It then refers to Section 34, Appx. 13, 14, which provides that parties not served, who have knowledge of the proceedings, may intervene on equitable terms within a year *or be precluded* from having any rights *adjudicated* in such proceedings. The construction of Section 34, as applied here, would make the decree ineffective as to the owner of petitioner's lands, even if it had known of the existence of the suit, and had an opportunity to appear.

We make the following quotation from

In Re Willow Creek, 74 Or. 592,
(144 Pac. 505, 146 Pac. 475). (1915)

at pages 617-18:

> "10-12. The objections to the process are evidently directed to that part of Section 34 referring to persons who are interested in the water of a stream upon which an investigation and determination are made, upon whom no service of notice is had. Section 33 in effect declares a decree of the court confirming a determination of the board to be conclusive as to claimants *lawfully embraced in the determination.* This declaration *precludes mak-*

ing such decree or order of determination binding and conclusive upon any except those upon whom service of notice has been made pursuant to the statute. Section 34 states that it is the duty of all claimants when such proceedings are instituted to submit proof of their claims. The latter part of this section, particularly referring to interested parties who have not been served with notice, provides that such parties who had no knowledge or notice of the pendency of the proceedings may intervene upon equitable terms at any time within one year, or be precluded from having their rights adjudicated in such proceeding; that is, the words 'any such claimant' who fails to submit proof of his claim and is barred and estopped from subsequently asserting any prior rights refer to 'existing claimants upon the stream or other body of water lawfully embraced in the determination,' including *only* those who have been duly served with process."

In the respondent's brief resisting the petition for the writ herein, it was claimed that those claiming rights to an adjudicated stream must claim through the adjudication, if the claim asserted antedates the adjudication. In support thereof, the provisions of the Code are cited, together with cases there listed at page 4 of Respondent's brief. What has just been said will, with the citation from In Re Willow Creek, fully answer this claim.

CHAPTER XIV.

(15) THE DESERT LAND ACT.

(Assignment of Error Number 4)

At some proceeding in the case mention was made of the construction placed upon the Desert Land Act of March 3rd, 1877, by the Oregon Court in *Hough vs. Porter,* cited below. That construction was to the effect that the Act severed from lands patented after the date of the Act all of their riparian rights, leaving the waters subject to appropriation for the reclamation of arid lands; that it affected all lands wherever situated, whether arid or not, and the rights of all parties acquiring lands after the passage of the Act, whether the same were acquired for the purposes of the Act or not. The decision was rendered by Commissioner King, who evidently constructed the opinion at odd times over a long period. His purpose was plainly to make way for the passage of the Water Code. After its passage adjudications of rights were made without regard to the effect of the decision, except in a few instances.

At the time of the discovery of this severance of the riparian rights from lands patented subsequent to the enactment of the Land Act, there had been adjudications over a period of thirty-two years in total ignorance of this condition. In the opinion in *Hough vs. Porter* the writer thereof sought to harmonize with his theory all of the water decisions that had been made

in the interim. From a consideration of the cases which we have cited, decided during that period, the court will readily believe that the task was rather difficult of performance.

The Commissioner had some trouble reconciling *Sturr vs. Beck* with his theory, but nothing was sufficiently difficult to prevent the Commissioner from ultimately arriving at the desired result. Applied, it would make a mess of titles in Oregon, some of which would be bottom lands on the streams, which could not under any stretch of the imagination, be termed as desert lands. Others would be mountainous lands, high above reclamation projects, and some, of course, would be in the arid country. As a national Act, it would certainly work havoe with land titles in various jurisdictions. Persons owning meadow lands in the eastern part of the United States, which have been enjoying the exercise of the use of their riparian rights from the streams on which they border, would suddenly find them rendered arid indeed, and stripped of their value.

Washington refused to follow *Hough vs. Porter;* California also refused to follow it, although two other states did follow it. The majority opinion here seemed to be to the effect that the decision is unsound, and the presiding Judge, in the dissenting opinion, accepted that as the court's view. But because of the language in the majority opinion, and because of the necessity of

a construction of this Act upon that point, the matter is of real importance here, and we proceed to consider it.

The Desert Land Act is the Act of March 3rd, 1877, Title 43, United States Code Annotated.

The sections material to the questions involved here are, as taken from U. S. C. A. Title 43, Sections 321, 322 and 323, which are set out in full at Appendix 103-5.

Their importance, if any here, arises from the fact that just before, or rather at the time of, the Session of the Oregon Legislature of 1909, which enacted the Water Code, the case of

Hough vs. Porter,
51 Ore. 318-456; 95 Pac. 732; 98 P. 1083.

was decided by the Oregon Court.

In a lengthy opinion the Supreme Court determined in effect that this Act denuded all public lands of their riparian rights in the streams on which they bordered. In effect, that lands patented subsequent to that date did not carry such riparian rights because the same had been severed from the public lands by that Act. Petitioner contends that the decision is unsound, and the Act is not subject to that construction, and that the construction does not affect plaintiff's claim to common law riparian rights which were acquired by its predecessor upon the issuance of the patent.

In support thereof petitioner makes these points:

1. That the Congress did not in that enactment in-

tend to interfere with the riparian doctrine as applied in the states.

Kansas vs. Colorado, 206 U. S. pages 46-118, 27 Sup. Ct. 655, 51 L. Ed. 956.

Here this Court decided that states could determine for themselves whether or not they would adopt the riparian doctrine.

In

John E. Scott vs. Charles P. Lattig,
227 U. S. Supreme Court, 229-245,
57 Law Ed. 490, 33 Sup. Ct. 242.
Decided February 3, 1913,

it is said in effect that this court does not hesitate to decide that Congress in making the distinction between streams navigable and those not navigable intended to provide that the common law rules of riparian ownership would apply to lands bordering on the latter, but that the title to the lands bordering on navigable streams should stop at the stream.

In

U. S. v. Rio Grande Dam & I. Co.,
174 U. S. 690,
19 Sup. Ct. 770,
43 L. Ed. 1136, 1141,

this court said that it is the unquestioned rule of the common law that every riparian owner was entitled to the continuous flow of the stream.

Sturr, Appellant, v. Beck,
133 U. S. 541-552,
33 Law Ed. 761.

This is a decision of 1889, dealing with a patent issued in March 1883, based upon an entry upon the land made in March, 1877. The question arose between the riparian right of the settler and one who sought to take the water from the land by right initiated subsequent to the entry upon the land. The decision was rendered in 1899.

Certainly this court knew of the existence of the Desert Land Act of March 3rd, 1877. And certainly counsel would have called the attention of the court to it, if it had any bearing upon the case.

We quote from that opinion at length at the Appx. 57-58-59.

That case and

Faull v. Cooke, supra,
Larsen v. The O. R. & N. Co., supra,
Brown vs. Baker, supra,

are all to the effect that rights for appropriation are cut off by the entry upon the lands for settlement followed by compliance with the law and the issuance of the patent.

United States v. Central Stockholders Corporation, 52 F. (2d) 322-339, 329, (a quotation therefrom is set out at Appx. 106 where the volume is erroneously stated as 51 F. (2d) instead of 52).

It is to the effect that the long acquiesence of the federal government in the use of waters arising on or flowing through public lands, leads to the conclusion that it has been the constant policy of the government of

the United States to allow the citizens of the various states to work out their own system of law with relation to water rights, without intervention or adverse legislation by the federal government.

See also

Still et al v. Palouse Irrigation & Power Co. et al (Supreme Court of Washington. Aug. 19, 1911) 117 Pac. 466, 468-9,

a decision of the Supreme Court of Washington, discussing *Hough vs. Porter et al,* and in which the court declined to follow the Oregon court in the construction of the Desert Land Act.

See also

San Joaquin & Kings River Canal & Irr. Co. v. Worswick,
203 Pac. 999-1008.
(Supreme Court of California, Jan. 4, 1922),

where the Supreme Court of California likewise refused to follow *Hough vs. Porter* in construction of that Act. That court said there was nothing in the Act that justified giving that particular part of it thus construed so wide an application as to embrace all the lands of the United States wherever situated. That the plaintiffs in that case did not claim that any of the land belonging to defendants was purchased or acquired under the Desert Land Act, and that the Act itself commits the determination of the question as to what may be considered desert land to the Commissioner of the General Land Office.

The majority opinion of the Appellate Court in this case seemed to hold that *Hough vs. Porter* is unsound. We discuss the case, however, only because the opinion stated that the Appellate Court need not decide whether or not it should follow *Hough vs. Porter* in considering petitioner's patent IF the Hood River case and the Water Code could withstand petitioner's attacks on constitutional grounds. (R. 428, 73 F. (2d) 562). Except for this statement, we would have believed that the writer of the opinion had a very definite idea when this statement was written, as to whether or not the Hood River case and the Water Code *could* withstand these constitutional attacks.

Mr. Justice Wilbur, Senior Judge, dissenting, concurred in that portion of the main opinion which construed the Desert Land Act. Undoubtedly, reading the opinion, with the majority opinion, it definitely determined that the construction of the Desert Land Act in *Hough vs. Porter* was unsound, and that petitioner's patent was not affected by the doctrine of that case.

Petitioner believes it is entitled to have the decision of the federal court in the construction of a federal statute applicable to the entire country.

Two other states have followed *Hough vs. Porter*, and soon we will have such a diversity of opinion that titles throughout the Nation will be rendered uncertain.

Furthermore, Oregon will have scattered here and there over the entire state lands patented before and

lands patented after March 3rd, 1877. So there will be confusion and distinction which the Congress never intended should exist. Hence we make Point 2 under this title, and cite:

Pease v. Peck, 59 U. S. 595,
18 How. 595-601,
15 Law Ed. 518, 520. (May 14, 1856).

In this case it was said that where the Constitution and laws of the United States are drawn in question, the courts of the United States must determine the controversy for themselves.

We know that this Court will want uniformity in decisions affecting federal statutes; that the federal courts might themselves desire at some time to construe this statute more definitely than it has had occasion to do. And we believe that the matter should be determined here.

It is also there held that this Court does not feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in the Circuit Court, to reverse that decision contrary to its own convictions in order to conform to a state decision made in the meantime. "Such decisions have not the character of established precedent declarative of the settled law of a state." Similarly, we argue that this court would not feel bound to follow state construction of a federal statute that did not meet with this court's approval.

CHAPTER XV.

(16) THE POLICE POWER.

The majority opinion in the Appellate Court decided adversely to the petitioner by holding that the state in the Water Code exercised the police power of the state in the destruction of those riparian rights in which the water had not been beneficially applied before the enactment.

We cite the following from the opinion:

> "The Oregon Code of 1909 itself purported to be an exercise of the police power of the state as shown by Section 74:
>
> 'Emergency.—Whereas, there is great uncertainty existing throughout the State with reference to the water rights of various parties along the streams, ditches and waterways as to their several interests therein, entailing expensive litigation and engendering many animosities and much bad blood, thereby endangering the public peace and safety of many sections of the State, and Whereas, it is urgent that these conditions be remedied for the preservation of the public peace, health and safety of the State, this act shall be in full force and effect from and after its approval by the Governor.'" (R. 443-4; 73 Fed. (2d) 567).

At pages 173-176, herein under the title of "Emergency Clause—The 1909 Water Code," we quote *Kadderly vs. Portland, supra*, the controlling Oregon case holding that such an emergency clause attached to a legislative act is for the purpose of preventing

the same from being referred to the people under the referendum powers of the Oregon Constitution; that such laws so excepted by such emergency clause from the operation of the referendum do not depend alone upon their *character,* but upon the necessity of their enactment to accomplish certain purposes. That as the Constitutional Amendment does not declare what shall be deemed laws of the character indicated, the Legislature must necessarily determine that question. But that it is the duty of the courts after the law has been enacted to determine in a proper proceeding whether it conflicts with the fundamental law, and to construe and interpret it to ascertain the rights of the litigant.

We also there cite Cameron vs. Stevens, an Oregon case of 1927, to the effect that the clause is used for the purpose of preventing a referendum of the act to the people. Therefore, the Appellate Court is clearly in error in assuming that the emergency clause caused the act to declare that it was in fact an exercise of the police power, having no relation whatever to the police power. But if it had related to the police power, let us see upon what subjects the reference was made.

The emergency clause recites in brief that there is great uncertainty as to the existing water rights of various parties along the streams, entailing expensive litigation, engendering many animosities and much bad blood, THEREBY endangering the public peace and safety of many sections of the state.

This far it is dealing with the subject of adjudicating the rights to the use of the waters of the stream.

It continues:

Whereas it is urgent

> "that these conditions be remedied for the preservation of the public peace, health and safety of the state, this act shall be in full force and effect from and after its approval by the Governor."

So the conclusion covers the same subject. In other words, the urgency was the necessity for the adjudication of the respective rights of the users.

There is in the emergency clause no suggestion of any imminent danger to the public peace, etc., unless riparian rights be at once "abrogated;" there is no suggestion that there is any great haste required to give an appropriator the right to appropriate the waters belonging to the riparian proprietors. There is no suggestion that it is immediately necessary that riparian proprietors may have opportunity to appropriate the water belonging to other riparian proprietors. If there were shown in the act any intention to discriminate against those holding, under the riparian doctrine, the emergency clause did not indicate any urgent public demand for a law so discriminating.

Let us see what the purposes of the Act were. According to the title, the Act was to provide a system for the regulation, control, distribution, use and right to the use of water; for the determination of existing rights thereto, etc.

Under our Point 4, chapter III, page 116 hereof, we quote from In Re Willow Creek, 74 Ore. at 610, where the Oregon court said in substance:

That it is evident that in the enactment, the state being interested in providing a system for the "regulation of the use of water" and for the "determination of existing rights," exercised the police power in order to provide a complete system of CONTROL and a means for making the record of the respective rights of the users.

We also quoted from pages 613-14 of 74th Oregon, that the state enacted the Code to accelerate its development, promote peace and good order, minimize vexatious controversies, provide a convenient way for adjustment thereof, and for recording the rights of the various claimants. And that it thereby *"to a limited extent"* called into requisition the police power.

This court quoted the language there used in the Pacific Livestock case, supra. These expressions of the Oregon court defined the purposes of the Act as broadly as the title of the Act will permit.

In 1915, when the Willow Creek case was decided, the author of the opinion therein set forth the foregoing purposes that brought into being the Water Code. And though he was subsequently the writer of the opinion in the Hood River case, he apparently in 1915 did not have the belief that the police power was exercised in the confiscation of vested rights, nor to enable

the state to define what constituted a vested riparian right.

Inasmuch as the Appellate Court in this case decided the same by the application of the doctrine of police power, it would be interesting to know *whether the Oregon court has ever taken that view of the question;* whether the Oregon court had ever said that the Legislature in the enactment of the Code had exercised the state's police power in obliterating vested rights. And if so, in what case has the Oregon court so held? If it has said that riparian rights which had not been used before the enactment of the Code *were destroyed* by the state *in the exercise of its police power* through the enactment, we have not been able to discover the place in any opinion where the court so held.

If the declaration of such exercise of the police power is thought to be couched in the following language in the opinion in the Hood River case, we would like to consider the opinion from that standpoint. The language is: (p. 181).

> "It was within the province of the legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor."

That paragraph was apparently meant to determine that the legislature had the power to invade the province of the courts, and to assert what was *then* a vested

right, and to make that rule applicable to prior acquired riparian rights. We think the language quoted was not intended to declare that the "definition" was made in the exercise of the police power, nor that the police power could be used to authorize the legislature to make decrees for the courts.

If, however, it should be thought that the declaration of the use of the police power is to be found in the following language at 182, we should like to discuss the matter from that standpoint.

> "Under our present statute, defining what shall constitute a vested right of a riparian proprietor, the claim of the Pacific Power & Light Company as a riparian owner of land on Hood River to a continuous flow of the specified quantity of water over its land cannot be maintained."

The reference there to "our present statute" undoubtedly refers to the Water Code. No other statute with which we are acquainted could have been thought to determine a vested right *by definition.*

In the paragraph preceding that last quoted at page 182 is the following:

> "The statute of this state plainly declares that all waters within the state from all sources of water supply belong to the public: Section 5715, Or. L. This is, of course, subject to the further provision of the act."

We dare say that the court will read the foregoing sentence to the effect that Section 5715, Oregon Laws,

is a part of the Water Code. But it is not. We quote it from Volume 2, Oregon Laws, page 2318:

> "§ 5715. Water Belongs to Public. All water within the state from all sources of water supply belong to the public. (L. 1909, c. 221, p. 370, § 1; L. O. L. § 6575.)"

The Chapter 221 of the Laws of 1909 of which the foregoing section is a part, was not in existence at the time at which the Water Code went into effect, namely: Upon its being filed in the office of Secretary of State, February 24, 1909. Chapter 221 of the Laws of 1909 contains no emergency clause, and its effective date is governed by Section 28 of Article IV of the Oregon Constitution, set forth at Appendix 35. This makes such an Act take effect at 90 days after the end of the session at which it was passed. The 1909 Legislative Session was held from January 11, 1909 to February 20, 1909, inclusive. So that Section 5715 was not effective until the expiration of eighty-six days after the Water Code became effective.

Section 5715 of Oregon Laws was, as we have shown, Section 1 of Chapter 221 of the 1909 Laws.

That chapter is quoted sufficiently for all purposes here, at the Appendix 70-71. It was an act providing for the granting of franchises of the water powers of the state, and for collecting fees therefor. We do not believe the purpose of the Act was to enable appropriators to take riparian rights that had been destroyed in the Water Code. Nothing came of it. Its Sections 3,

4, 5 and 6 were repealed. (Laws of 1915, page 277).

The decision of the court in the Hood River case did not apply the police power.

If it be contended that the paragraph which we cited above, 114 Oregon, 181, and/or the paragraphs which we cited from page 182, indicate an intention to declare that the state by the exercise of its police power destroyed riparian rights that had not been used prior to the enactment of the Code, we have to say that the position cannot be sustained. As heretofore pointed out in chapter II at pages 32-35 hereof, it was held in the Hood River case that the power company's lands involved therein were acquired from the State of Oregon at a time when

> "the law prevailing in this state authorized an appropriator subject to rights existing at the time of his appropriation, to take water from the streams of the state for a beneficial use, and convey the same to non-riparian land; provided he could legally obtain access to the stream."

The law referred to is, at page 181 of the opinion, said to be the Act of 1864, Hill's Laws, 3832, set forth at the opinion 180. It authorizes miners to make local laws in relation to water rights, possession and working of placer claims, etc., subject to the laws of the United States.

So the court in the Hood River case decided adversely to the power company upon the ground that it had obtained its lands from the state which had at that time

recognized the right to make appropriations thereon.

We quote from the syllabus of the case as follows:

> "21. A power company has no right to a continuous flow of water as riparian owner, where its land belonged to state at time of passage of Section 5715, Or. L., declaring all waters within state to belong to public, but is only entitled to water appropriated under statutes."

Note that the statement in the syllabus is that the lands were acquired from the state; and that at the time of the passage of Section 5715 (1909) the land still belonged to the state.

At any rate, whatever the facts may be, the decision against the power company in the Hood River case rests upon the doctrine that the lands had been acquired from the state at a time when the waters passing through the same were subject to being appropriated for use on non-riparian land.

A casual reading of the majority opinion herein might give the impression that the Appellate Court in using the doctrine of the exercise of the police power might have considered that it was following the state court in its opinion in the Hood River case.

But we believe that this is not borne out upon an examination of that case.

We regard the application of the police power doctrine as a determination upon the part of the Appellate Court that at the time of the passage of the Water Code there abided in petitioner's lands the com-

mon law riparian rights to the use of the waters of Rogue River for which we contend. Otherwise, why apply the extraordinary doctrine of the exercise of the police power.

If, as the opinion in the Hood River case asserts, the State of Oregon recognized and adopted the rule conferring the right of appropriation of water long before it conveyed the lands to the power company's predecessor, and that because of that fact the riparian doctrine did not apply, then there is no question in the decision as to the exercise of the police power.

Under such conditions the doctrine asserted in the paragraphs quoted from pages 181 and 182 of the opinion, were unnecessary to the decision, and did not create a precedent that the Appellate Court should have followed. Under such circumstances it was immaterial whether or not it was within the province of the Legislature of 1909 to define a vested right of a riparian owner. It was immaterial whether under that statute "defining what shall constitute a vested right of a riparian proprietor" the claim of the power company, as an owner of lands on Hood River to a continuous flow of the stream could not be maintained. For according to the decision particularly applying to the rights of the power company, it was determined that it had bought lands which the state had denuded of the riparian right.

Let us draw from the majority opinion herein the conclusion of the court upon this matter, with grounds

upon which the conclusion rests. We quote from the majority opinion at R. 449-450, 73 F. (2d). 568-9:

> "At common law, the usufruct of the riparian owner was not absolute; it was conditioned on the equal right of every other riparian owner to the use of the water. By the Oregon legislation, his usufructuary privileges were not destroyed; his right of access to and to the equal use of the waters for ordinary domestic purposes were preserved. *Re Water Rights of Hood River,* 114 Or. at 190, 227 Pac. at 1089. This legislation, however, has changed the conditions under which the riparian owner's privilege otherwise to use the water may be exercised. On the one hand, his unrestricted right reasonably to use his fair share of the waters for beneficial purposes is now subordinated to a prior appropriation for beneficial purposes. On the other hand, he is no longer limited in such beneficial use to his fair proportion of the waters over and above those needed for domestic purposes by all riparian owners; and as a riparian owner, he is in a peculiarly advantageous position to exercise the right of appropriation. The statute cannot be said to take away property from one in order to give it to another, even though the effect of the operation of the statute in a specific case may be so to transfer the privilege of making some specific use of the water.
>
> We conclude then, that the riparian owner's right to the natural flow of the stream substantially undiminished has been *validly abrogated* by the Water Code of 1909 as construed by the Oregon court. Plaintiff's assertion of such a right in this case cannot, therefore, be sustained."

The majority opinion concedes that if the act accomplishes the taking of the property, this could not be done without due process of law.

We submit the following case of interest upon this point:

Chicago, Burlington & Quincy R. Co.
vs. People of Illinois,
200 U. S. 561-601,
50 Law Ed. pages 596-612.

This was a contest between drainage commissioners in Illinois and the Chicago, Burlington & Quincy, plaintiff, as to the validity of a demand that the railroad company should remove a bridge, or if it continued to maintain it at the same point, to substitute one that will meet the requirements of the commission, adopted by the commissioners. The proceeding is based in part upon the Drainage Act of Illinois granting certain powers to the commission.

The legal questions involved were concerning the exercise of the police power of the state.

The opinion at 200 U. S. 592 holds that such power embraces regulations designed to promote public convenience, or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. That the validity of such regulation, whether established directly by the state or some public body acting under its sanction, must depend upon the circumstances of the case, and the character of the regulation, whether arbitrary or reasonable, or whether really designed to accomplish a legitimate public purpose.

As to the constitutional requirements of due process

of law where property is taken for public use, the court said: (page 593-4)

> "The constitutional requirement of *due process of law*, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If, in the execution of any power, no matter what it is, the government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 659, 34 L. ed. 295, 303, 10 Sup. Ct. Rep. 965; *Sweet v. Rechel*, 159 U. S. 380, 399, 402, 40 L. ed. 188, 196, 197, 16 Sup. Ct. Rep. 43; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349. If the means employed have no real, substantial relation to public objects which government may legally accomplish,—if they are arbitrary and unreasonable, beyond the necessities of the case,—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862. Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. There are, unquestionably, limita-

> tions upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police *regulations,* although they may interfere with the full enjoyment of private property, and though no compensation is given.' Sedgw. Stat. & Const. Law, 434."

In order to determine whether or not the Water Code is an Act resulting from the use of the police power of the State, we must, in this case, look to the terms and the provisions of the Act. The question of the exercise of the police power was never mentioned in the trial of this cause in the District Court, nor in the hearing thereof upon appeal in the Appellate Court.

The present situation of the case, having been decided upon the doctrine of the exercise of the police power, results, as petitioner believes, from the exercise of the imagination, if we may be pardoned for so saying, of the writer of the opinion in this cause. For, the matter not being in issue below, there was, of course, no evidence introduced in the case tending to show, one way or another, a public necessity for the confiscation of the riparian rights which had not been applied to a beneficial use at the time of the enactment of the code. It would do no good here to enter into a discussion of the

question as to whether there were or not any facts before the 1909 Legislature authorizing the use of the police power of the State to either regulate or take the private property of the riparian prorietor.

In the brief upon the merits in the Deschutes case, there was a discussion by the learned Attorney General of Oregon, upon the great necessity for certain legislation in Oregon respecting the use of the waters of the streams. Foot note R. 417; 73 F. (2) 559.

Whatever may have been the record in that case, there is nothing here that justifies either the petitioner or the respondents, or others who may appear herein, in attempting, ex parte, to submit evidence upon the emergencies that may now be thought to have been presented to the Legislature of 1909.

We are anticipating, because this brief offers petitioner's last opportunity to be heard upon the matter. It is, therefore, extremely difficult to discuss here the question of the exercise of the police power in the enactment of the 1909 Code. In other cases before this court, it has been able to consider external or historical facts leading to the enactment of the law being considered. For a statute to be valid as an exercise of the police power, it must bear a substantial relation to the existing evil, if there be one, and not be a mere attack upon property rights disguised as an exercise of the police power.

The courts are liberal in leaving it to the legislature

to say what the exigencies of the case requiring the exercise of this extraordinary power may be. But here the necessity for the exercise of this power is imaginary. There isn't a syllable in the Act showing an emergency justifying the exercise of the police power of the state upon any question involved in this case. One must look entirely to the emergency clause, which recites no grounds of emergency, except those that referred to the determination of water rights. These are said to be urgent because of the existence of bad blood, etc. But the entire clause refers to a subject with which we are not concerned, viz: the necessity for adjudication proceedings.

How, then, shall we determine that an emergency existed sufficient to justify the state in the exercise of its police power in depriving the petitioner of its vested riparian rights to the use of the waters of the stream? True, we can cite the cases which define the rules whereby this court may determine for itself whether or not the occasion existed for an interference by the state with the possession and use of the property of the individual. But, it is all beside the case, because throughout the Act there is not a syllable nor a clause that justifies the taking of the petitioner's property, or even regulating its use, by the exercise of the police power of the state. In many cases in which the right to the use of the police power is challenged, there have been allegations in the Act, the truth of which were questioned, and

so this court has reserved the judicial power to determine for itself whether the Act is one that is the result of the exercise of the police power. But from what does it determine it? From the declaration of the Act itself. In the absence of such a declaration, it *may have* been possible to have submitted proof to show a condition that may be claimed to have justified the exercise, by the legislature, of this extreme power. But whether this is correct or not, is immaterial in this case.

The Act stands before the court four-square, to be interpreted upon its terms as they are written in the Act.

As a reminder of the nature of this investigation, we submit these few following authorities. If there were facts recited in the Act, or otherwise legally appearing, upon which the court might act, we believe the case would be within the decisions quoted below.

Pierce v. Society of Sisters of Holy Names,
268 U. S. 510, 535; 69 L. ed. 1070, 1078.

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."

As to the position of this court in the consideration of an act containing representations as to the necessity for the exercise of the police power, we submit the following authority:

Lochner v. New York, 198 U. S., 45-76;
49 L. ed. 937. (1905.)

"It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber,* 136 U. S. 313, 34 L. Ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman,* 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213. The court looks beyond the mere letter of the law in such cases. *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064."

In the opinion, here, there was cited the case of

Pennsylvania Coal Co. v. Mahon,
260 U. S. 393; 67 L. ed. 322. (1922.)

This suit tested the police power of the State of Pennsylvania to pass the act forbidding mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them, land where the surface is owned by the owner of the underlying coal, and is a distance more than 150 feet from any improved property belonging to any other person.

The coal company contested the validity of the statute upon the ground that it had owned the other lands concerned, and in disposing thereof, had reserved the right to excavate and mine beneath the surface, and to remove the coal. The court said, on the question of police power: "As applied to this case, the statute is admitted to destroy previously existing rights of property and contract. The question is, whether the police power can be stretched so far."

There, the legislature recited the exigencies of the occasion, and the necessity for the exercise of the police power. The court said: The greatest weight is given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power. The court said that it was its opinion that the Act could not be sustained as to exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved.

The court expressed the rule to be applied in such case. We quote from the U. S. report at 415-416:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston,* 101 U. S. 16, 25 L. ed. 980. In general it is not plain that a

man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade v. Lynn & B. R. Co.* 172 Mass. 488, 489, 43 L. R. A. 832, 70 Am. St. Rep. 298, 52 N. E. 747, 5 Am. Neg. Rep. 367. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions."

In

Wilkinson vs. Leland,
27 U. S. (2 Pet.) 657-8,
7th Law Ed. 542, (1829).

Mr. Justice Story in passing upon a Rhode Island statute which amounted to a granting of title to a purchaser at an invalid sale from one in whose name the title stood, used this language:

"That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention. In *Terrett v. Taylor* (9 Cranch, 43), it was

held by this court that a grant or title to lands once made by the Legislature to any person or corporation is irrevocable, and cannot be re-assumed by any subsequent legislative Act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired. We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced. We are not prepared, therefore, to admit that the people of Rhode Island have ever delegated to their Legislature the power to devest the vested rights of property, and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted that they cannot contend for any such doctrine."

While this case was decided in 1829, yet the principles announced in the case were carried into the 14th Amendment to the Federal Constitution, as it is now construed and applied to the rights of personal liberty and of private property.

(17) THE CALIFORNIA CASES

We are induced to make the following discussion because of the prominence given to the subject in the majority opinion here.

The opinion quotes from and cites leading recent decisions of the California court, dealing with this problem of the exercise of the police power of the state in the matter of the power of the state to abrogate vested riparian rights.

We are glad to contribute to this interesting subject in the judicial lore of our country.

We are particularly glad to do so because we believe that the opinions of the California court cited by the Appellate Court, clearly establish petitioner's cause before this Court. It is our contention that these California cases cited will, if applied, be the undoing of the prevailing opinion in the instant case.

1st) The discussion of the subject suggests that the Appellate Court found it necessary, in order to abrogate the vested riparian rights of petitioner, to apply the doctrine of the use of the police power by the state. Otherwise, petitioner would have prevailed in that court.

As heretofore pointed out (Brief pages 32-38), the Oregon decision followed therein was not in point; the use by the Oregon Legislature of the police power for the destruction of riparian rights has never been asserted in any Oregon case. The doctrine was not urged in the Appellate Court nor in the District Court below, as the record will show.

(2) *Herminghaus v. Southern California Edison Co.*, cited at Opinion R. 436, 73 F. (2d) 564, is auth-

ority for our statement that the Water Commission Act of 1913, discussed below, was not an exercise of the police power of the state of California. Yet the Act did protect riparian rights, to some extent, and did fix a limitation within which they should be put to a beneficial use. From the discussion in the Gin Chow case, quoted below, (R. 439, 73 F. (2d) 565, as well as the opinion R. 439-440 and 73 F. (2d), we learn:

That because the California court felt impelled to adhere to the long established rule of *Lux vs. Haggin,* the Amendment to the Constitution of California, adopted in 1928, was made necessary. And, as stated in the Gin Chow case (if we may so designate it), the Amendment is held by the California court to be the exercise of the police power of the state.

California had, in the Commission Act a more elaborate but very similar law to that of the Oregon Water Code. But it did contain the element of notice which is lacking in the Oregon Code. And this is one of the reasons why the Oregon Code should not now have written into it, words that are not there — words that are necessary to justify the announcement that the Code "abrogated" riparian rights which had not been beneficially applied before the enactment of the Code.

In the court's quotation from the Gin Chow case, found at R. 443, Federal page 566, speaking of the Oregon 1909 Water Code, it stated:

> "Thereafter the Legislature adopted a water code limiting the riparian owner to a reasonable

beneficial use. The code was upheld. In re Willow Creek, 74 Or. 592, 144 P. 505, 146 P. 475."

At this point it is interesting to read the interpretation the California court put upon the Willow Creek decision, that the code limited the riparian owner to a reasonable beneficial use. The interpretation so given to the Willow Creek decision has not been that interpretation given by the Oregon courts. We have discussed it elsewhere (Bf. Ch. VII, pp. 130-149). Well might the California court have said that in the Willow Creek case it was decided that vested riparian rights were not *impaired* by the provisions of the Code, and that the decision cited Section 1 of the Code, and Subdivision 1 of Section 70 thereof, to support that holding.

The

California Water Commission Act,
Stats. 1913, page 1012,

after creating the Water Commission and defining its powers, etc., provided for investigation of streams, etc. And Section 11 reads as follows:

"§ 11. Water declared unappropriated. Public Waters. When action for condemnation is pending. Reservoirs may constitute single system. All water or the use of water which has never been appropriated, or which has been heretofore appropriated and which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or the use of water, or which has not been put, or which has ceased to be put to some useful

or beneficial purpose, or which may hereafter be appropriated and ceased to be put, to the useful or beneficial purpose for which it was appropriated, or which in the future may be appropriated and not be, in the process of being put, from the date of the initial act of appropriation, to the useful or beneficial purpose for which it was appropriated, with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or the use of water, is hereby declared to be unappropriated."

Here follows the portion of the section with reference to the water upon lands riparian to the streams, and which contains the ten year clause, and is the portion of the section with which we are particularly concerned:

"Public waters. And all waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purposes upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the state of California and subject to appropriation in accordance with the provisions of this act. If any portion of the waters of any stream shall not be put to a useful or beneficial purpose to or upon lands riparian to such stream for any continuous period of ten consecutive years after the passage of this act, such nonapplication shall be deemed to be conclusive presumption that the use of such portions of the waters of such stream is not needed upon said riparian lands for any useful or beneficial purpose; and such portion of the waters of any stream so nonapplied, unless otherwise appropriated for a useful and beneficial

purpose is hereby declared to be in the use of the state and subject to appropriation in accordance with the provisions of this act;"

The above paragraph, "Public waters", apparently divides those waters into two classes for the purposes of appropriation.

1. That all waters flowing in any stream, excepting so far as such waters had been at the time of the enactment, or were then, being applied to useful and beneficial purposes, upon, or in so far as said waters were or may be reasonably needed for useful and beneficial purposes upon lands riparian to such stream, were then and are thereby declared to be public waters and subject to appropriation.

2. If any portion of the waters of any stream *shall* not be put to a useful or beneficial purpose to or upon lands riparian thereto for any continuous period of ten consecutive years after the passage of the Act, such nonapplication shall be deemed to be presumption, that the use of such portions of said waters is not needed upon said riparian lands for any useful or beneficial purpose; that such portion of said nonapplied waters are declared to be in the use of the state, and subject to appropriation, etc.

A comparison of the provisions of the Oregon Water Code with this Commission Act would show this:

That the Oregon Water Code, as construed herein, cut the riparian owner off instantly—destroyed his

riparian rights, if he had not put them to a beneficial use at the time of the enactment. While the California Commission Act seeks to cut off the riparian owner if he fails to make a beneficial use within ten years, and also provides that the riparian use is limited to the quantity of water reasonably required upon the riparian lands. We are advised that the ten year provision has not as yet been passed upon.

> "§ 42 'Water.' 'Useful or beneficial purposes.' The word 'water' in this act shall be construed as embracing the term 'or use of water'; and the term 'or use of water' in this act shall be construed as embracing the word 'water.' Whenever the terms stream, stream system, lake or other body of water or water occurs in this act, such term shall be interpreted to refer only to surface water, and to subterranean streams flowing through known and definite channels. But nothing in this act shall be construed as giving or confirming any right, or title, or interest to or in the corpus of any water; provided, that the term 'useful or beneficial purposes' as used in this act shall not be construed to mean the use in any one year of more than two and one-half acre feet of water per acre in the irrigation or uncultivated areas of land not devoted to cultivated crops."

The following is Section 3 amending Article XIV of the California Constitution, and which was adopted November 6th, 1928:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water

be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained." (Statutes and Amendments of the Codes of California, 1929, Constitution of California LXX-LXXI).

In its discussion of California cases, the majority opinion quoted from the Gin Chow case, as follows: (R. 439-40; 73 F. 2d. 565-6.)

"Plaintiff, however, also urged that as against a non-riparian appropriator, a riparian owner was entitled to insist upon the undimished flow of the stream, no matter how slight both the benefit of such flow and the damage of the threatened diversion might be. The court, conceding that this

was a fair statement of the effect of the previous California decisions, held that this rule had been modified by a constitutional amendment, adopted in 1928, after the Herminghaus and Fall River cases, and that, in consequence, the rule of reasonable use now applied as between riparian owner and non-riparian appropriator. To the contention that the Amendment so interpreted was a violation of the state and federal constitutional guaranties against deprivation of property without compensation, the court answered:

'It was because this court felt impelled to adhere to the long-established rule of *Lux v. Haggin,* that a constitutional amendment was made necessary.* * * *"

The language above quoted connects onto and is a part of the following:

"Upon the adoption of the amendment, it superseded all state laws inconsistent therewith. Const. art. 22, §1; *People v. Kerber,* 152 Cal. 731, 93 P. 878, 125 Am. St. Rep. 93. The amendment is now the supreme law of the state, which the courts are bound to enforce, and it must be made effectual in all cases and as to all rights not protected by other constitutional guarantees."

At paragraph (15), page 17 of the Pacific, the California Court said that:

"The constitutional amendment of 1928 is an exercise of that (police) power."

The majority opinion continues its quotation from the Gin Chow case at R. 441, F. 566, as follows:

"'* * * There is a well recognized and established distinction between a "taking" or "damaging" for public use and the regulation of the use and enjoyment of a property right for the public

> benefit. The former falls within the realm of eminent domain, and the latter within the sphere of the police power. That the constitutional amendment now under consideration is a legitimate exercise of the police power of the state cannot be questioned. It is the highest and most solemn expression of the people of the state in behalf of the general welfare. The present and future wellbeing and prosperity of the state depend upon the conservation of its lifegiving waters. * * * ' ' '

It will thus be seen that the California court was unwilling to destroy the riparian rights which had always been recognized in the California court, without the aid of the constitutional Amendment, Section 3, Article XIV, *supra.* And this prompts the inquiry, whether this court will be asked in this case to take a more advanced step than the California court was willing to take under like circumstances.

This brings us to the question:

> WHAT WAS THE CALIFORNIA LAW ON THE RIPARIAN DOCTRINE AT THE TIME OF THE ENACTMENT OF THE WATER COMMISSION STATUTE?

From the language of the Gin Chow case, quoted in the majority opinion, supra, we may fairly assume that

> *Lux v. Haggin,*
> 10 Pac. 674-784,
> 69 Cal. 255 (1886)

referred to in said quotation from the Gin Chow case expressed the California riparian right doctrine as the same existed in that state at the adoption of the Water

Commission Act, and at the time of the decision in the Gin Chow case. The riparian doctrine as announced in that case is contained in the quotation which we make therefrom at Appendix 96-97. It is therein shown that the riparian proprietor's right to have the stream run through his land is a vested right, and interference therewith imports damages. The attributes of such a right are those announced in the Weiss case in the Oregon court, and in the earlier Oregon cases. The two cases were decided in the same year, the Weiss case in April, 1886, and Lux vs. Haggin in June of that year.

We have quoted at length from the Weiss case at Appendix 52-56. It is the doctrine of the continuous flow, undiminished in quantity or quality, except such changes as may result from the use of other riparian users.

The California doctrine came through the statute of April 13th, 1850.

We quote from

Lux vs. Haggin, supra:

Quotation from 10 Pac. Rep. 721:

> "It may be maintained, at least plausibly, that the admission of California into the Union 'on an equal footing with the original states' of itself operated an immediate transfer of the property in the innavigable rivers to the federal government, so that the property of the state was momentary. However this may be, on the thirteenth of April, 1850, the legislature of California had

passed an act 'adopting the common law,' which reads:

'The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all the courts of this state.' St. 1850, p. 219."

Compare the California statute under which it acquired the common law riparian doctrine with the territorial statute under which Oregon accepted the principles of the common law. We have quoted from this court and from the Oregon Court upon this subject at Appendix 46-7.

To this please add the following citation made in the Hood River case at 114th Oregon, 166:

"The territorial law of Oregon, passed June 27, 1844, contained this provision:

'The Common Law of England and principles of equity, not modified by the statutes of Iowa or of this government, not incompatible with its principles, shall constitute a part of the law of this land.' Laws of Oregon, 1843-49, p. 100.

Article XVIII, Section 7, of the Constitution of Oregon provides 'That all laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed.' See *Perry v. Fletcher*, 93 Or. 43, 52 (182 Pac. 143); *Wright v. Wimberly*, 94 Or. 1, 37, (184 Pac. 740)."

Section 2 of Article 1 of the Organic Law of the Provisional Government of Oregon was continued in force by Section 7 of Article XVIII of the Oregon Constitu-

tion, adopted September 18th, 1857, preparatory to the admission into statehood. (Appx. 47.)

It was urged in *Lux vs. Haggin* that the common law doctrine was contrary to the policy of the state. Upon that question we quote from the decision as printed at page 702-3 of the 10th Pacific:

> "But the policy of the state is not created by the judicial department, although the judicial department may be called upon at times to declare it. It can be ascertained only by reference to the constitution and laws passed under it, or (which is the same thing) to the principles underlying and recognized by the constitution and laws. * * * *
>
> If the law is settled, we cannot override the established rule to secure some conjectual advantage to a greater number. If, however, we were permitted to do this, the inquiry would still remain whether the recognition of a doctrine of appropriation (such as is contended for by respondent) would secure the greatest good to the greatest number. Observe, if that be the true rule, the appropriator does not necessarily act as the agent of the state, employing the power of eminent domain for the benefit of the public, but by his appropriation makes the running water his own, subect only to the trust that he shall employ it for some useful purpose. It would hardly be contended that while he continues to use it for a useful purpose, a statute would be valid which should take it from him, without indemnification, under a pretext of regulating the 'common use' of the water more profitably, or of providing for its distribution so as to benefit a greater number of persons. He would have a vested right to the use of the water, although the riparian proprietors would have none. If, indeed, one who has appropriated the water of a stream since the adoption of the present constitution has appropriated it 'for sale, rental, or distribution' to others, the rates he may charge con-

> sumers must be fixed by local authority. Const. art. 14, § 1. But if he shall consume the water himself, one may thus, for his own benefit, arbitrarily deprive many of an advantage which, whether technically private property or not, is of great value, and thus secure to himself that which, by every definition, is a species of private property in him."

Lux vs. Haggin is the leading case upon the subject of the riparian right.

Under the law of Kentucky, Oregon and California, and many other states, ownership of the bed of a non-navigable stream is recognized as fully as the ownership of the land bordering thereon, or the power plant through which the water flows.

In *United States vs. Kress* and *United States vs. Kelly,* decided in this court in the October Term, 1916, the court was dealing with the impairment of the riparian right to the extent of destroying the power of the mill dam that was essential to the value of the mill. In determining the rights of the respective parties, this court used the authority of *Lux vs. Haggin*, citing it with many other cases in the following language:

> *United States vs. Kress and United States vs. Kelly,*
> 243 U. S. 316,
> 61 Law Edition, 746,

quoting from the United States Report at page 330:

> "Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself. The right to have the water flow away from the milldam unobstructed, except as in

the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land. *Gardner v. Newburgh,* 2 Johns. Ch. 162, 166, 7 Am. Dec. 526; *Tyler vs. Wilkinson,* 4 Mason, 397, Fed. Cas. No. 14,312; *Johnson v. Jordan,* 2 Met. 234, 239, 37 Am. Dec. 85; *Wadsworth v. Tillotson,* 15 Conn. 366, 373, 39 Am. Dec. 391; *Parker v. Griswold,* 17 Conn. 288, 299, 42 Am. Dec. 739; *Harding v. Stamford Water Co.,* 41 Conn. 87, 92; *Holsman v. Boiling Spring Bleaching Co.,* 14 N. J. Eq. 335, 343; *Beach v. Sterling Iron & Zinc Co.,* 54 N.J. Eq. 65, 73, 33 Atl. 286; *Scriver v. Smith,* 100 N. Y. 471, 480, 53 Am. Rep. 224, 3 N. E. 675; *Crook v. Hewitt,* 4 Wash. 749, 754, 31 Pac. 28; *Rigney v. Tacoma Light & Water Co.,* 9 Wash. 576, 583, 26 L. R. A. 425, 38 Pac. 147; *Benton v. Johncox,* 17 Wash. 277, 281, 39 L. R. A. 107, 61 Am. St. Rep. 912, 49 Pac. 495; *Lux v. Haggin,* 69 Cal. 255, 390, 10 Pac. 674; *Hargrave v. Cook,* 108 Cal. 72, 77, 30 L. R. A. 390, 41 Pac. 18; *Pine v. New York,* 103 Fed. 337, 339, 50 C. C. A. 145, 112 Fed. 98, 103; *Wood v. Waud,* 3 Exch. 748, 775, 154 Eng. Reprint, 1047, 18 L. J. Exch. N. S. 305, 13 Jur. 472, 10 Eng. Rul. Cas. 226; *Dickinson v. Grand Junction Canal Co.,* 7 Exch. 282, 299, 155 Eng. Reprint, 953, 21 L. J. Exch. N. S. 241, 16 Jur. 200; *Stokoe v. Singers,* 8 El. & Bl. 31, 36, 120 Eng. Reprint, 12, 26 L. J. Q. B. N. S. 257, 3 Jur. N. S. 1256, 5 Week. Rep. 756 (Erie, J.)."

This case as concerns the Federal Constitution is in line with *Logan vs. Spaulding Logging Company, supra,* as it concerns Section 4 of Article XI of the Oregon Constitution (Brief pages 121-2).

All of the courts that have dealt with the riparian right have recognized it to be property. As the Circuit Court for the District of Oregon said in speaking of

the Oregon law upon the subject in November, 1910, in

Eastern Oregon Land Co. vs. Willow River Land & Irr. Co.,
187 Fed. 468:

> "The general doctrine of riparian rights is too firmly established in this state to be shaken now by judicial decision. It is useless to cite authorities. (3) The riparian proprietor is entitled to the ordinary and usual flow of a stream as long as it is of any beneficial use to him, and this may, under some circumstances, include flood or overflow waters reasonably to be anticipated during ordinary seasons. *Miller & Lux v. Madera Canal & Ir. Co.,* 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391; *Miller v. Bay Cities Water Co.,* 157 Cal. 256, 107 Pac. 115, 27 L. R. A. (N. S.) 772."

This language was quoted by the Oregon court with approval and passed on to this court for consideration in *Pacific Livestock Co. vs. Lewis* and in Re Willow Creek, 74 Ore. 625.

In the Water Commission Act of California there were plain, definite statements whereby the use of the riparian rights were regulated, limited and under certain circumstances, liable to be taken by the right of appropriation. In that statute there was something definite that might be said as to the impairment or abrogation of the riparian right. But here we have an Act accomplishing, according to its terms, three things:

(1) To allow appropriations subject to existing rights;

(2) To adjudicate and determine rights, and

(3) To regulate the rights determined and adjudicated.

There is no provision for regulating or terminating riparian rights, which as the Oregon court has said, came to the owner with the land. Their attributes are well known; there is nothing about them to adjudicate; they are acquired when the land is acquired; they are not lost by nonuser, but only by the owner's grant, or by adverse possession for the period of prescription. They are like a piece of land with valuable stone cliffs upon it. They stand there as nature created them. If the public requires the stone for public use it might condemn; if it desires to regulate the handling of the stone it could doubtless do that. But there it stands as property, and while it may be taken for the public good, it cannot be legally taken by a private corporation from its owner, and for its sole selfish benefit. There is nothing in the Act that says this may be done, and such an extraordinary privilege is certainly not to be read into the Act.

The majority opinion in the instant case quoted from

Fall River Valley Irrigation Dist. vs. Mt. Shasta Power Corp.
202 Cal. 56,
259 Pac. 444 (1927).

This is a 1927 decision of the California court, rendered the year before the adoption of the California constitutional Amendment, supra. In addition to the

quotation made in the majority opinion at R. 438, F. Rep. 585, we add the quotation set forth at Appendix 77-8.

Briefly the court said that it had re-examined the nature of the riparian right, and was satisfied with its previous announcement. That

> "we, therefore here reassert the riparian right to be a vested property right inhering in and a part and parcel of the abutting lands—a right not gained by use or lost by disuse" etc.

That the right to the use of the water of the stream was under the same protection at the hands of the law as any other vested right.

And this, notwithstanding the provisions of the Water Commission statute.

The case of

Herminghaus v. Southern California Edison Co.,
252 Pac. Rep. 607-627,
200 Cal. 81 (1926),
cited in the majority opinion (R. 436. F. 564),

was decided in the year 1926 without the aid of the constitutional Amendment, and it construed the Commission Act.

The decision presents a most complete review of the California water right cases. A reading of the decision leaves no room to doubt that the California court adhered to the riparian doctrine substantially as announced in *Lux vs. Haggin*. The case is authority for the following propositions of law, applicable in California in 1926:

That riparian owners are entitled to the reasonable use of the waters at all seasons, having a vested right to the usufruct of the flowing streams in the usual and ordinary course of their flow.

That riparian owners as against appropriators need not limit the natural flow of the streams by artificial appliances;

That the upper riparian proprietor may use the waters of the stream for power;

That an appropriation made under the California statute divests no private rights, but merely gives preference over subsequent appropriators.

That Section 11, of the Water Commission Act, declaring waters public waters, is inapplicable to waters beneficially used by a riparian owner.

That Sections 11 and 42 of the Water Commission Act construing the term "useful and beneficial purposes" are held *not* within the police power of the state.

If the Water Commission Act is not within the police power, it will be difficult to put the Oregon Water Code as an Act under the police power of the state.

So far as the question involved here, namely: the destruction of our vested riparian rights, is concerned, the court in the Herminghaus case, and in a review of the previous California decisions, made this quotation:

252 Pacific Reporter at page 615:

"But the riparian owners have a right to have the stream flow past their land in its usual course,

and this right, so far as it is of regular occurrence and beneficial to their land is, as we have frequently said, a right of property, 'a parcel of the land itself.' Neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not, without compensation, be taken from the owners of these lands and transferred to others."

The opinion in the Gin Chow case, supra, was written by Mr. Justice Shenk. And because he is the author of the latest decision in the Supreme Court of California on the effect of its 1928 Constitutional Amendment, and which we shall presently cite, we will briefly rewiew the case to show the history leading to the adoption of the Amendment.

This whole situation impresses one that by a comparison of the legislative enactments and the decisions

of the courts of Oregon and California, there is no possible legal basis for a holding that the Oregon Water Code, so far as pertains to the question here, is an exercise of the police power of the state, intended and designed to destroy the riparian vested right.

The opinion in the Gin Chow case, beginning with paragraph 9, page 13, 22 P. (2d), traces the California history of this riparian question from the adoption of Section 4468 of the Political Code, 1850, down to and including the adoption of the Constitutional Amendment in 1928.

After quoting the statute, the opinion states:

> "This language is general in its terms. It does not mention the law of riparian rights, but has been held to include it by necessary implication."

(This is the Oregon case exactly).

The opinion continues:

The English law of riparian rights was applied in the state in 1886 in *Lux vs. Haggin*, wherein it was declared that the common law right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil; passes with it, not as an easement, or an appurtenant, but as part and parcel of it. Use does not create nor disuse destroy the right. It extends to the natural flow of all the water, unless diminished by reasonable application by other riparian owners, etc. That the doctrine had been affirmed and reaffirmed consistently since the decision. In other words,

"It is the established law of this state, that as

> between riparian proprietors the right of each as against the other is confined and restricted to the amount of water reasonably necessary for useful and beneficial riparian purposes."

but that the reasonable use does not apply as between the riparian and the appropriator.

Then the court cites the California authorities holding that position, stating that since *Lux vs. Haggin*, in controversies between *riparian* owners and *appropriators* the doctrine of reasonable use *does not apply*, citing *Miller vs. Lux et al.* It is stated, if any doubt ever existed upon this point, none can now remain since the decision of the court in

Annaheim Union Water Co. vs. Fuller,
150 Cal. 327,
88 Pac. 978,
11 L. R. A. (N.S.) 1062.

That neither court nor legislature has a right to say that because such water may be more beneficially used *by others* it may freely be taken by them. It quotes that, public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. It discusses the Herminghaus case.

It recites that in 1932 the Legislature sought to avoid the rule adhered to by that court *by adopting* the Water Commission Act of 1913, and incorporating therein Section 11, which provided that stream waters of the state not theretofore put to beneficial use or reason-

ably needed for beneficial purposes, should be deemed public waters, and subject to appropriation; and that Section 42 sought to place a limit on the amount of water which should be deemed, (per acre), a reasonable and beneficial use; that under Section 15 the Commission was vested with power to declare what waters in the state were unappropriated.

Note that this is all *regulation*, with powers almost permitting confiscation.

It then cites

Tulare Water Co. vs. State Water Com.,
187 Cal. 533,
202 Pac. 874

in which it was held that Section 15 was an unlawful delegation of judiciary power to the Commission; that in the Herminghaus case the effect of the decision was that it was beyond the constitutional power of the Legislature to assume the *"right to determine"* what are useful and beneficial purposes to which private property—riparian right—might be put; that the right thus attempted to be interfered with was declared to be a vested right, protected by an unbroken line of cases since *Lux vs. Haggin*, which established a rule of property which was *beyond the power of the legislative* department to disturb.

It then discusses the *Fall River Irrigation District case, supra*, and says:

> "We are now confronted with the question whether the law of riparian rights in this state

must be modified to conform to a direct and positive constitutional declaration."

That immediately following the decision in Herminghaus, December, 1926, the Legislature in 1927 proposed the Amendment, and it was adopted November 6, 1928. (It is there quoted). It then states that it was because the court felt impelled to adhere to the long-established rule in *Lux vs. Haggin* "that a constitutional amendment was made necessary." It recited that there was a well recognized and established distinction *between taking or damaging for public use, and* the *regulation of the use* and enjoyment of a property right for the public benefit; that the former falls within the *realm of eminent domain*, and the latter within the *sphere of police power*, and that the amendment is a legitimate exercise of the police power.

The opinion stated that it was contended that the constitutional amendment was too indefinite to be effective; that the amendment uses the words "reasonable" and "unreasonable" without the statement of any facts, which if existing, would constitute reasonableness or unreasonableness; that objection was made in the Herminghaus case to the terms of Section 42 purporting to define the amount of water per acre that would be deemed useful and beneficial; that the objection was *sustained* on the ground that it was beyond the power of the legislature so to provide, and that

"the extent to which such riparian landowners need and use and are entitled to have the benefit

of the flow and overflow of such waters under their vested riparian rights therein is a matter which depends upon the circumstances of each particular case."

That what is or is not a reasonable use is a *judicial question.*

The most recent California case on the Amendment is

Peabody vs. City of Vallejo,
89 Calif. Decisions, 165.

It will be reported at 40 Pac. (2d). 486.

It is not reported and quotations must be made from California Decisions.

The opinion is by Mr. Justice Shenk, author of the opinion in the Gin Chow case. The suit, so far as it interests us here, involved a controversy between appropriators and riparian proprietors, and the right of injunction for the preservation of the riparian right. It seems to seek to defend the application of the constitutional Amendment by stating what the court believes has been accomplished along similar lines in other western states. Of these it states, (89 C. D. 172):

"That nine *now* recognize the modified doctrine of riparian rights, and that eight have entirely *abrogated* the doctrine of riparian rights. The nine with the modified doctrine are said to include Oregon and California; the eight that have abrogated it include *Colorado,* which it seems to us never did have the riparian doc-

trine, but that the common law doctrine was rejected by that state.

But as to Oregon, unless we include the doctrine of the Hood River case, it has always had the common law riparian doctrine, except as modified by *prior* appropriation.

Speaking of the application of the constitutional Amendment the court said, quoting from page 178 of the California Decisions:

> "(5) There is and should be no endeavor to take from a water right the protection to which it is justly entitled. The preferential and paramount rights of the riparian owner, the owner of an underground and percolating water right, and the *prior* appropriator are entitled to the protection of the courts at law or in equity. When there is no substantial infringement of the right, that is, when there is no material diminution of the supply by reason of the exercise of the *subsequent* right, the owner is entitled to a judgment declaring his *preferential* and *paramount right* and *enjoining* the *assertion* of *an adverse use which might otherwise ripen into a prescriptive right.* (*San Bernadino v. Riveside, supra.*) If the exercise of the appropriative right cause a substantial diminution of the supply the owner is entitled to compensation for the resulting damage to his lands. But the technical infringement of the right is not actionable. (*Modoc L. & L. S. Co. v. Booth, supra; Holmes v. Snow Mountain W. & P. Co.*, 36 Cal. App. 394; *Stratton v. Mt. Hermon Boy's School*, 216 *Mass.* 83, *except to establish priority.* This is but another way of saying that the appropriator may use the stream surface or underground, or percolating water, *so long as the land having the paramount right* is not materially damaged. Any use by an appropriator which

causes substantial damage thereto, taking into consideration *all of the present and reasonably prospective recognized uses,* is an impairment of the right *for which compensation must be made either* in *money* or *in kind,* and in the event public use has not attached the owner of the paramount right is entitled to injunctive relief."

The conclusion reached is stated at page 183. We quote it in so far as it is of interest here:

"We therefore conclude: 1. That the rule of reasonable use as enjoined by section 3 of article XIV of the Constitution applies to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying landowner, or the percolating water right, or the appropriative right.

2. That the test of reasonable use as so enjoined was not applied to the facts in the present action and the judgment should be reversed, and the cause remanded for trial *as a condemnation action.*"

We make these deductions from the California decisions considered:

That the California court did not consider it within the powers of the legislature by any act to destroy the vested riparian right except to take the same for public use by due process of law and, of course, upon compensation paid.

That desiring to accomplish a regulation of waters used or useable, both by appropriation and through the riparian right, California adopted its Constitu-

tional Amendment, intending to bring the same into harmony with the provisions of the Federal Constitution. True, in doing this, the Amendment seems to have dealt quite freely with the property of the riparian proprietor, to the extent that this amounts to a regulation and yet preserves the right to use the water beneficially.

But from it all we seem to learn this lesson:

That vested riparian rights cannot be destroyed constitutionally without the consent of the owner; that no policy of the state adopted subsequent to the acquisition of the riparian right, can give the state any power to confiscate or to take it from one person and turn it over to another.

We have no concern with the California situation. What may ultimately be the result thereof is immaterial here. We are seeking only to prevent another riparian owner across the stream, from destroying the stream, and stream bed, in which it and we have common rights and common use, and to protect our rights by decree.

But if the State of California, through the able court which it has, finds itself unwilling to confiscate a vested riparian right by either act of its Legislature or constitutional amendment, and this seems to be the case, we maintain, and with all due respect, that the majority opinion went far afield when it held that the Oregon Water Code has "validly abrogated," through

the exercise of police power, the petitioner's riparian right. It seems unthinkable that this could be done without notice; without opportunity to be heard; without a consideration of what use petitioner might seek to make of this right, and that a legislative act, bearing the emergency clause to put it into immediate effect, could thus destroy so important and valuable a property, and do it constitutionally.

CHAPTER XVI

(18) THE REMEDY AND ITS EFFECT

Petitioner believes that to protect its rights it will be necessary to permanently maintain the injunction now in force, restraining further dynamiting in the river bed, the removal of shattered rock from the dynamited area, and preventing respondents from impairing petitioner's vested riparian rights in the stream; and to direct a decree confirming and declaring petitioner's said riparian rights, and adjudging the same to be unaffected by the Desert Land Act. Also to reverse the decree and judgment of the District Court, and its judgment for costs, and to grant petitioner affirmative relief, as aforesaid, together with its costs.

(19) EFFECT OF SUCH DECREE

The protecting of petitioner's rights does not require the holding of the Water Code to be an unconstitutional Act. In fact, as written, but not as construed, it is a wholesome and constitutional Act.

The granting of petitioner's relief will not undo nor affect adjudications that have been had under the Act.

True, the rights of claimants have in some of the adjudication proceedings been construed as appropriations. Among these are the claims of the Power Company in the Hood River case, supra, and the Deschutes Company in the Deschutes adjudication, supra, also the Leonard rights in the Sucker Creek adjudication, supra, etc.

(20) THE QUESTION INVOLVED HERE WAS NEVER DECIDED BY THE OREGON COURT.

But the question involved here has not been decided in any of these cases, nor in any adjudication so far as we know.

As suggested in the dissenting opinion, this is not a case between a power company and an upper irrigation company, as in the Hood River case.

But it stands alone in presenting the question (and for the first time) of the right of an intending appropriator, depending upon water permits issued under the Act, to take and appropriate the water held under a riparian right, vested prior to the passage of the Water Code. In other words, whether the Water Code empowered the State Engineer to issue permits carrying such extraordinary power, and so far reaching in its consequences; whether or not the language of Section 1 of the Act is to be abrogated. It provides that appropriations can only be made subject to the terms of the Act, and subject to existing rights; that nothing therein shall be so construed as to take away or impair the vested right of any person, firm, etc., to any water. It presents the question as to whether or not each permit issued must be issued subject to the then existing riparian rights.

PETITIONER MAINTAINS:

That this question was not decided nor presented in the Hood River case, nor in any other case in

which the Oregon Court construed the Water Code.

Herein we have referred to the language in the Hood River case, holding that the Code had defined a vested riparian right, as dictum. Perhaps this is too strong a statement. If the decision in the Hood River case as to the rights of the power company is put upon *two* grounds, we presume that the decision upon *both grounds* would be stare decisis, *so far as the power company is concerned.* But in fact, the decision was upon the ground that the state had, while it owned the land, and prior to its transfer, maintained the policy that appropriations could be made adverse to the riparian rights. And so, as stated in the syllabus of the case, the lands had no riparian rights when the power company acquired the same.

But be that as it may, we think this Court has the right to disregard the portions of the Hood River opinion which we mentioned as dictum, in considering whether an Oregon Court had really so construed Subdivision 2 of Section 70 of the Code, *as to make an adjudication thereon,* namely:

That rights not beneficially used before the enactment were abrogated (to use the language of the Appellate Court), when in fact the decision of the question was not necessary to the decision in the Hood River case. The question is pressed harder upon us from the fact that the so-called dictum cannot be found in the Water Code; from the fact that there is not a syllable

in the Code upon the subject, and hence, no construction to that effect could be made, nor could it be material in the Hood River case.

But the question here was not a question in the Hood River case, namely:

The right of petitioner's neighbor across the stream, itself a riparian proprietor, to confiscate, on the authority alone of the Engineer's permits, petitioner's vested rights which existed before the enactment of the Code under which the permits were issued.

To accomplish this purpose would require eminent domain proceedings. These would require, of course, the due process of law, and the payment of compensation. Under the Oregon Constitution, Section 4, Article XI, supra, (Brief page 121), no person's property shall be taken by any corporation under authority of law, without compensation being first made or secured in such manner as may be prescribed by law. And as we suggest in a subsequent chapter XVII, when this construction of the Water Code shall have permitted the illegal "abrogation" of petitioner's riparian rights, may petitioner not again, under the eminent domain provisions of the 1909 Statute, heretofore cited, condemn this property—these water rights—and take them back and use them for its lawful purposes of operating its stand-by plant for the maintenance of its better service to consumers.

(21) THE SOLUTION SUGGESTED IN THE DISSENTING OPINION.

We refer to the portion of the opinion at R. 477-8, 73 F. (2d) 576-7.

The suggestion of granting an injunction unless the respondents file a disclaimer to one-half of the water, etc., is subject to these qualifications:

That petitioner does desire to construct its stand-by plant, but that in order to obtain its portion of the water it must first repair the damage which will have resulted from the removal of the portion of the river bed shattered by the dynamite, and, doubtless, at a considerable cost.

Then too, the petitioner is entitled to have a decree as prayed for, which would confirm its riparian rights and declare them unaffected by the Desert Land Act.

In

Jones vs. Conn.
39 Ore. 30, at page 39,
(64 P. 855; 65 P. 1068, 53 Cent. Law Jour. 128).

it is said that the only thing necessary to entitle the riparian proprietor to his riparian rights, is to show that his land borders upon the stream; that this shown, he is entitled, under the law to the right to the use of the waters subject only to the rights of other riparian proprietors on the stream. So that the allegation of petitioner's Complaint, that its lands so border on the stream, is an allegation of its said riparian rights.

This allegation found in paragraph V of the Bill of Complaint (R. 7-8), admitted in the respondent's Answer by paragraph VI (R. 23), is a sufficient allegation and admission of the status of petitioner's rights to entitle it to such decree under its prayer in its Complaint to that effect (R. 16).

In

Peabody vs. City of Vallejo, supra,

(quoted at page 236 hereof), the Supreme Court of California in a decision rendered subsequent to the decision in this case, construed the California Constitutional Amendment to this effect:

That there should be no endeavor to take from a water right the protection to which it is justly entitled; that the preferential and paramount right of the riparian owner, and the prior appropriation of an appropriator, are entitled to the protection of the courts of law and equity; that where there is no substantial infringement upon a right, the owner thereof is entitled to a judgment "*declaring his preferential and paramount right,* and to enjoin the assertion of an adverse use which might ripen into a prescriptive right." That any use by an appropriator causing substantial damage to such right, taking into consideration all of the *present and the reasonable prospective recognized uses,* is an impairment of the right, for which compensation must be made, etc., and authorizing injunctive relief.

Upon this subject we also refer to our chapter XXIII on the subject of "Injunctive Relief."

If a law is to regulate the use of water under the riparian right, then, to say the least, the regulation must be upon notice, and an opportunity to be heard, and to show that the right is necessary to the claimant's purposes, but that the time may not be ripe for the making of such use.

For instance, power rights, such as these, must, in good business, be acquired in advance of the necessity for their use. The actual use may need to await the public demand for the power. In fact, compliance with the requirements imposed upon a utility furnishing the power, make it necessary to be "fore-handed," (to take the word from the majority opinion), and acquire the rights in advance of the demand for the power to be made from the use thereof. A proper regulatory tribunal could hear the proof upon these matters, and orderly determine, in the interest of the public, the time within which such rights should be so used. But when they are acquired by a utility with public service powers and obligations, and acquired for the utility's purposes, they are legally *dedicated to the public use.* Eminent domain may be exercised to acquire land upon which to erect the works, or for lands and facilities upon which to transmit the power when necessary for this public use.

In 1926 petitioner sought to build and was ready to build, its stand-by plant.

It is no lack of electricity that causes the Cement Company to desire to manufacture, rather than to purchase from a utility, the power which it requires. No such claim exists here.

A decision that the Cement Company could confiscate, through its permits, petitioner's rights, would only open the way for the condemnation of them from this private corporation, or cause petitioner to otherwise supply its demands from other sources.

A decree which would permit the Cement Company to excavate the shattered material in the river bed would, of course, necessarily have to protect the petitioner's riparian rights.

In this depression, when the demand for power is greatly reduced by the closing of the principal industries supplied by the utility, namely, the saw mills, an exact date as to when the petitioner would require its portion of the water, cannot be fixed. And this is the nature of the riparian right.

CHAPTER XVII

(22) PROPERTY DEVOTED TO AND HELD FOR A PUBLIC USE CANNOT BE TAKEN FOR ANOTHER PUBLIC USE INCONSISTENT WITH THE PUBLIC USE TO WHICH THE PROPERTY IS ALREADY DEVOTED.

The effect of the decree herein is as stated in the dissenting opinion, to take the property from this public service corporation, which holds it for its public uses, and to transfer it to the Cement Company, a private corporation, and without compensation.

There is no case in the Oregon Court construing the Water Code as having the power to accomplish such a result.

The dictum in the Hood River case concerning the legislative definition of a vested riparian right does not reach the case.

It was not contemplated by the Legislature that property acquired or held for a public use could be so taken for private use.

In fact, Section 72, *Eminent Domain,* grants the right to condemn property for a public use of the waters of the Oregon streams.

Chapter 75, Section 3, page 133 of the Laws of said year 1909, (quoted at Brief pages 156-8), provides that public service electric corporations, such as petitioner, may condemn riparian rights and other property for

such public utility service as that in which the petitioner is engaged.

Considering the purpose and policy of the Legislature in the Water Code enactment, it may be safely said that it did not intend to obstruct public service and use of the waters of the Oregon streams, nor to turn the same over to a private corporation to be by it taken and used adversely to the public use.

The Appellate Court in

Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho,
111 Fed. Rep. 842,
49 C. C. A. 633, (1901)

held that the rule is supported by abundant authority that property dedicated to public use cannot be taken for another *public use.* To authorize a second condemnation there must be express legislative authority. This case was followed in a decision in the Tenth Circuit in 1930 in the case following. We make the quotation from this later case, thereby obtaining the doctrine of the two cases in the one quotation:

Clarke et al v. Boysen et al, and nine other cases.
Nos. 40-48, 165.

Circuit Court of Appeals, Tenth Circuit,
February 17, 1930.
39 Fed. Rep. (2nd), 800-822.

Quotation from page 816:

"(19,20) The general rule is that property already devoted to a public use cannot be taken for another public use under the power of eminent do-

main, where the latter taking will totally destroy or materially interfere with the first use. *C., R. I. & P. Ry. Co. v. Williams* (C. C. Kan.) 148 F. 442; *C., M. & St. P. Ry. v. Nation* (D. C. Iowa) 237 F. 709; 20 C. J., p. 602, § 90. On the other hand, under general statutory authority, property already devoted to one public use may be condemned for another public use, under the power of eminent domain, where the latter taking will not materially impair or interfere with or is not inconsistent with the use for which the land was first appropriated. *Pacific Postal Tel. Cable Co. v. Ore. & C. R. Co.* (C. C. Or.) 163 F. 967; *Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Ida.* (C. C. A. 9) 111 F. 842; 20 C. J., p. 605, § 91."

Certiorari denied. 282 U. S. 869, 870, 75 Law. Ed. 768.

The reason for the rule, which is, as we think, universal, that property taken or held for one public use cannot be taken away for another public use inconsistent therewith except by express authority, is this: that the corporation from which the property is thus taken can condemn the property for its public use, and so on indefinitely.

That this is the general rule, see

3 Cook on Corporations,
5th Eddition, § 906.

Each of the State Engineer's permits which the Cement Company is using as the basis of its right to destroy the river bed, and petitioner's right in the stream, was in the first instance issued to respondent City, and by it sold to the Cement Company in the agreement between the parties of October 19th, 1926, a copy of which

is Exhibit A to the joint Answer of respondents (R. 38). The permits are described severally under subdivisions (b) and (c) of paragraph 3, (R. 40-41).

The City's ownership of the 220 second-feet right of "Oregon Water & Power Co." on respondents' side of the river was also so sold (subdivision (a) of paragraph 3, (R. 39); also the McClure right for 75 second-feet on petitioner's side of the river, subdivision (d) of paragraph 3, (R. 41). Admitting the 220 s. f. right runs naturally into the site of the power plant, and with its head will manufacture more than twice the power required for the City's use. (References cited at Brief chapter XIX).

(23) PETITIONER COULD CONDEMN THE WATER RIGHTS AFTER THE CEMENT COMPANY CONFISCATED AND APPROPRIATED THE SAME TO ITS OWN USE.

The Cement Company might insist, of course, on the petitioner paying the $40,000.00 value, which the petitioner offered to the City, and thereby make a profit over the $22,500.00 which the Cement Company is paying to the respondent City. The petitioner would have to restore the river bed at great cost.

Can authority be found for such vain and useless procedure?

CHAPTER XVIII

The depredations in the river bed, and which are enjoined herein, were, as the Cement Company admits, done entirely upon its own responsibility, independent of that of the City. Its sole reason, if any, for believing that it had a right to dynamite the river bed, and remove the shattered rock therefrom, is to be found in permits to appropriate water, issued by the State Engineer of Oregon under the Water Code. They are not vested rights, nor any rights at all. They are not completed permits; they have not been formally granted. In other words, they have not taken the form of the certificate issued under the Code at the time when the holder becomes entitled to the use of the water. They are in their present condition mere licenses or options, which may never be completed.

To this effect are such permits described by this Court in *Wyoming vs. Colorado.*

We cite authorities under the following title:

(24) STATE ENGINEER'S PERMITS

These are not adjudications, but mere licenses to appropriate. As to many, nothing ever is done under them by the intending appropriators. In such case there is no appropriation; and even in others the amount of the appropriation turns on what is actually done under the permits.

Wyoming v. Colorado, 259 U. S. 419-496; 42 Sup. Ct. 552; 66 Law Ed. 999, 1023.

"In fact and in law they are not adjudications, but mere licenses to appropriate, if the requisite amount of water be there. As to many nothing ever is done under them by the intending appropriators. In such cases there is no appropriation; and even in others the amount of the appropriation turns on what is actually done under the permit."

The Supreme Court of Idaho in

Washington State Sugar Co. v. Goodrich, 147 Pac. 1073, 1076 (Supreme Court of Idaho, April 28, 1915)

construed such a permit as a mere declaration of intention to create a water right which may never be anything more than an intention.

In

Bassinger v. Taylor, 164 Pac. 522-528, (Supreme Court of Idaho, April 3, 1917),

the Supreme Court of Idaho said:

That the issue presented in that case by the cross-complaint therein is the ownership of a water right, and on this issue the holding of a permit from the State Engineer has no probative force. It is not a water right, and the Idaho Court has held that it is not an appropriation.

Again, in

Marshall v. Niagara Springs Orchard Co., 125 Pac. Rep. 208-213 (Supreme Court of Idaho, June 8, 1912),

the Idaho Court denied the right of an appropriator to enter upon patented lands for the purpose of surveying, saying that the purpose was for the making of maps,

surveys and plans on an application to appropriate the water under such permits, and that the entry is a trespass.

Other Idaho cases are quoted at Appx. 62-3.

We cite

Talbot vs. Joseph, 79 Ore. 308,
155 Pac. 184.
(79 Ore. at 318):

Here the Oregon Court enjoined the defendants from entering upon plaintiff's land for the making of an appropriation. The opinion quotes Section 1 of the Water Code stating that the section does not give the right to private individuals to invade the premises of another for the purpose of diverting water from a stream; that it is only by power of eminent domain, which has never been granted to an individual for private purposes, that such a prerogative can be exercised, and then only for public use.

CHAPTER XIX

There are not many material facts in issue in this cause. Such facts as were issuable are plainly determined in the record, and are readily ascertained by record references given, so that the court will not be burdened with any labor because of such issues.

We have heretofore, particularly in the Statement of the Case, pointed out the facts concerning the dynamiting of the river by the Cement Company (Brief, pages 15-25); the purpose of that dynamiting, showing that it was to create a deep channel in the bed of the Rogue River sufficiently long, wide and deep to draw into the river all of the water at the ordinary stage thereof, and twice the amount normally flowing there at low water (Appx. 122-3-4-5). That it was the intention of the Cement Company to remove the shattered rock from the river bed, and thus draw the water from petitioner's land, and that this it would do unless restrained; that it was in the act of removing it when enjoined herein (Ans. XII, R. 24-5); that the Cement Company intended to leave enough water on petitioner's side of the stream to make a fishway required by the Oregon law to be left on the installation of such power plants (Brief, page 30); that it would leave that much water because it had to do so, thus using petitioner's lands for its own conveniences. These and other facts have been recited with record references.

We will, therefore, here set out only such additional facts, with references, as we believe will serve to aid the court in its investigation.

(25) THE CEMENT COMPANY IS THE RESPONDENT IN INTEREST.

October 19, 1926, respondent City sold its riparian lands and the 220-second feet right, and the McClure right for 75 second-feet to the Cement Company, for a consideration of $22,500.00. The subject is treated at Appendix 115-17. Exhibit "A" to respondents' Answer (R. 38) is the contract of sale and purchase.

Such a contract in Oregon is construed and held to make the Cement Company the owner of the equitable interest, leaving the City to hold the legal title as security for the unpaid portion of the purchase price. To this effect is:

Sievers v. Brown,
34 Oregon 454, 456,
(56 Pac. 171), (1899).

Quillen v. Schimpf,
133 Or. 581, 587,
(291 Pac. 1009), (1930).

Quotations from these cases are set forth at Appendix 116-117, to which we refer.

(26) CITY'S POWER REQUIREMENTS.

The City's total power requirements are less than 170 horse-power. This is a maximum demand. A kilowatt

equals three-quarters of a horse-power. Testimony of the petitioner's Division Manager Thompson, quoted at Appendix 150, (R. 168).

Mr. Muirhead of the Cement Company testified that the City's requirements which the Cement Company was bound to furnish were 20 kilowatts, which would be, according to said testimony of Thompson, 15 horse-power. The testimony that 170 horse-power was the limit of the requirement was not disputed.

The amount of power that could be made from respondents' 220 second-feet, with the McClure 75 second-feet, at the available head is shown by Engineer Boyle's testimony to be 350 kilowatts (quoted at Appx. 150, R. 201), which would be in excess of 250 horse-power, much over the maximum requirement of 170, supra.

City's 220 s. f. and 75 s. f. would flow naturally into respondent's power plant without excavation of the portion of the river bed shattered by the blasting.

In the trial of the former case between the parties (35 F. (2d) 317, 1929) Mr. Muirhead testified that his Cement Company could not get along with the 220 second-feet; that it would not build a plant for that; that it could easily get the 220 second-feet without going across the river for it, (quoted at Appx. 148-9 from R. in former case, introduced here, 219-220).

Engineer Boyle testified that all of the water of the City's appropriated rights, the 220 second-feet, plus the

McClure 75 second-feet, (total 295 second-feet), would flow naturally into the respondent's contemplated power plant without the removal of any of the rock from the shattered area, that is,--with the water flowing in a state of nature (in its natural channel), and this would be so at the stage of low water, (Appx. 147, quoting from R. 196-7). This is undisputed in the record.

Petitioner admits the right of the City to its 220 second-feet appropriation, and the 75 feet McClure appropriation. But the adjudication proceedings, Defendant's (Respondents') Exhibit "O", require the 75 second-feet to be returned to the river above petitioner's land. Hence, petitioner's objection to its use *several miles below its point of return,* and on the respondents' side of the river, (Appx. 146).

Hence, we say that there is no question of the needs of a municipality involved in this case. The 220 second-feet with the available head at the place of use will make more power than the City's maximum needs. That much water will naturally flow into the contemplated power plant of the respondents at low water with the river in a state of nature. Hence, the *City's requirements* did not make it necessary to dynamite the bed of the river, nor to remove the blasted rock from the shattered area.

As quoted, supra, Mr. Muirhead, for the Cement Company, took the entire responsibility for drilling the

holes in the river bed into which the dynamite was inserted, and caused the dynamite to be exploded, (Appx. 122, R. 324-5), thus precipitating immediately, as he must have known it would, the present controversy.

CHAPTER XX

(27) EFFECT OF REMOVING FROM THE RIVER BED THE ROCK SHATTERED BY THE DYNAMITE.

This subject with record references is treated at Appx. 131 to 143.

EXHIBITS

In the examination of this question it will be helpful to examine the evidence descriptive of the following numbered exhibits, to which reference is made in the testimony upon this subject. These exhibits are the following, described in the testimony at the following record pages, quoted in the Appendix as stated.

Plaintiff's (Petitioner's) Exhibit 9, R. 135, Appx. 126

Plaintiff's (Petitioner's) Exhibit 10, R. 139, Appx. 127

Plaintiff's (Petitioner's) Exhibit 12, R. 145, Appx. 128-9

Plaintiff's (Petitioner's) Exhibit 22, R. 349, Appx. 129

Plaintiff's (Petitioner's Exhibit 2 plus 23, R. 350, Appx. 129-30

PLAINTIFF'S EXHIBITS NO. 2 AND NO. 23

NOTE:

EXHIBIT NO. 2 IS IDENTICAL TO EXHIBIT NO. 23 EXCEPT THAT THE LINE DESIGNATED "A-P" WITH NOTE "OUTLINE OF REEF AS LOCATED APRIL 26-27, 1931, ETC." — IS NOT SHOWN ON EXHIBIT NO. 2.

DETAIL PLAN AND CROSS SECTION OF REEF IS SHOWN ON PLAINTIFF'S EXHIBIT NO. 22.

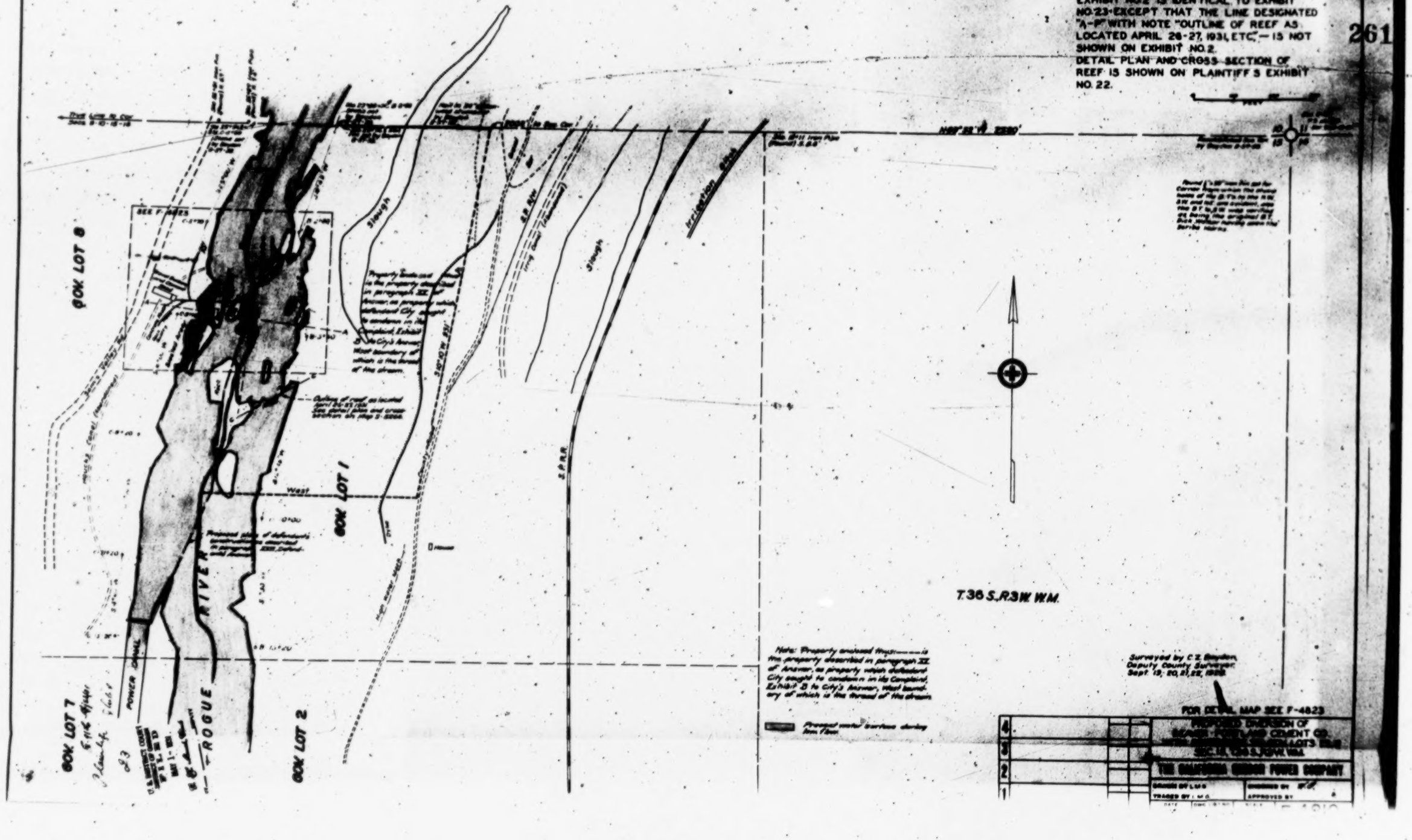


Exhibit 2 plus 23 was used by Olsen, petitioner's Engineer, in explaining the manner in which the reefs of rock in the river bed so divert the current as to divide the stream practically equally on the lands of the petitioner and respondents respectively. This is particularly helpful for a quick understanding of the river at the place of controversy. This testimony is quoted with record references at Appx. 132-3-4. This testimony also shows the blasted area, the dimension thereof, etc.

Engineer Boyle took Plaintiff's (Petitioner's) Exhibit 2, now called "2 and 23" and covered the same subject (Appx. 134-5, quoted from R. 192-3).

Mr. Boyle explained the effect of the removal of the rock from the shattered area; that the opening made would receive and discharge the 1347 second-feet (covered by the permits) at a water surface elevation at 1069 or at 1068, or 1067; that when the Cement Company's power plant would be operated there would be practically no water flowing over the reef marked "C-C" on Plaintiff's (Petitioner's) Exhibit "2 and 23," leaving 100 to 150 feet of dry land opposite Petitioner's Lot 1.

But above the reef C-C would be a pond; that the reef C-C controls the flow of the water on the east side of the river; but that if the shattered rock be not removed (in other words if the injunction stands) the river would remain in its natural state, and two-thirds of the water would flow to the west side below

and west of the line on the map A-B to B-C, (Appx. 134-5-6-7, quoting as indicated from R. 192-3 and R. 196.

CHAPTER XXI

(28) TYPE OF POWER PLANT TO BE INSTALLED BY CEMENT COMPANY WOULD PUT THE WATER OF THE RIVER AT ITS CONTROL.

Mr. Muirhead testified that his company intended to build a hydro-electric plant for the manufacture of electrical power by the use of turbines and generators; that the turbines would be equipped with gates that would be operated automatically, according to the amount of power used at the cement mill. That when the electric load required at the mill is taken, that amount of water will automatically be let into the turbines or wheels, except that there would be maximum amount that the company could not exceed (Appx. 139-40, quoting R. 111).

Engineer Boyle testified that he heard Mr. Muirhead's explanation, is well acquainted with the type of plant, and described in detail the manner of its operation. The cement mill, situated at a distance of less than a mile from the site of the plant, would be operated by turning on and off the motors drawing the amount of power required. This action would automatically open the turbines drawing from the canal the amount of water necessary at the available head there, to make the power; that the sudden turning on of the power would automatically increase the quan-

tity of water necessary to pick up the additional load, meaning the amount of energy required to run the motors. He explained that there is a set of gates that are operated by a governor which is electrically controlled. These gates open and close on the turbines, allowing to pass, the required amount of water to generate the load as indicated by the delivery at the end of the distribution line, (cement mill). The gates are operated automatically; if there is no load at the cement mill there would be no water flowing through the electric plant. When the mill is not in operation the water would be discharged through spillways; that in the ordinary operation of the cement plant the usual thing to do would be to draw the waters from petitioner's property whenever the flow was less than 1340 second-feet; that naturally, if the power is required for the Cement Company's use, it would be economical and proper in the operation of the plant to draw all of the water it could get—all of the water available, (Appx. 140, 143, quoting R. 188-191, 208, 209, R. 199).

The record describes the situation at the place of the explosion. The removal of the shattered rock would make a comparatively straight race into the forebay of the canal leading to the turbines; at the head of the canal is a spillway, and in the side of the canal below, another. So at its will, the Cement Company could draw all or any part of the flowing water from petitioner's land. The fluctuation would make it impossi-

ble to use petitioner's riparian right for any purpose.

(29) STAND-BY PLANTS AND THEIR USES EXPLAINED.

We have briefly covered this subject in the latter portion of the "Statement of the Case." Brief, page 11. A full explanation of these plants and of their uses is to be found at Appx. 143-5. Here is shown the great necessity for the installation by petitioner of such a plant upon its lands involved herein.

CHAPTER XXII

Petitioner and respondents, respectively, own all of the lands lying under the waters of Rogue River, and between the banks thereof, at the place with which we are concerned. Under the ancient Federal Act of May 18, 1796, the stream and the bed of the river were common to both petitioner and respondents.

And the act of the Cement Company in the destruction of this river bed, the use of which was common to the respective parties, was violent and uncalled for,—an illegal act. With all due respect for those who committed the act, it was made in total disregard of the rights of the petitioner, and in defiance of law. It evidenced an irresponsiblity, or at least a wantonness, that is unexplainable. By no legerdemain could it solve the problems of the contending parties. It was not the usual method of determining important rights to property. It could hardly be said to be in accordance with any of the maxims of equity. Carried to a conclusion, the act would have deprived petitioner, without due process of law or compensation, and in violation of the Constitution of the United States, of its property worth to it in excess of $30,000.00. It was property needed, and badly needed, by the petitioner as a public utility in its service of power to the public, including the Cement Company. It was an effort to take by force, a stream which it sought to use in the manufacture of power for

itself; power which it could acquire in the usual way from the utility that stood ready to serve it, and which was by law required to do so.

(30) THE RIVER BED

By the terms of the Federal Act of May 18, 1796, and still in force, it is provided that in all cases, like this one, where the *opposite banks of a non-navigable stream belong to different persons, both the stream and the bed of the stream become common to both.*

We construe this to mean that they are common owners in the right to use both the stream and the stream bed. Here, the respective owners actually own to the thread of the stream. This thread is the bounary of the respective parties, separating their lands. But together they have the right to use both the stream and the stream bed, as provided by the Federal Statute. The bed is the way, or course, for the stream. The right of use is, under the statute, joint, as between the owners of the opposite banks of the stream. We cite the statute:

Section 9 of Chapter 29 of the Act of May 18, 1796, being Revised Statutes, Section 2476, as printed in Volume 2 of the United States Compiled Statutes of 1901, reads:

> "Sec. 2476. Navigable rivers within public lands to be public highways.
>
> All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where

the opposite banks of any streams not navigable belong to different persons, the *stream and the bed* thereof shall become common to both.

Act May 18, 1796, c. 29, Sec. 9, 1 Stat. 468.
Act March 3, 1803, c. 27, Sec. 17, 2 Stat. 235."

This statute was construed by this Court in the case of

John E. Scott v. Charles P. Lattig, 227 U. S. 229-245, 57 L. ed. 490, 33 Sup. Ct. 242, (decided February 3, 1913).

This decision was dealing with the effect to be given to the admission of Idaho as a state, and to the disposal of fractional subdivisions on the Snake River, a navigable stream, and the statute was relied upon in the determination of the question involved.

We quote from that portion of the decision at 227 U. S. 242:

"Coming to the effect to be given to the admission of Idaho as a state and to the disposal of the fractional subdivisions on the east bank, it is well to repeat that Snake River is a navigable stream, for there is an important difference between navigable and non-navigable waters in such a connection. Thus, Rev. Stat. Sec. 2476, U. S. Comp. Stat. 1901, p. 1567, which is but a continuation of early statutes on the subject (Acts May 18, 1796, 1 Stat. at L. 464, chap. 29, Sec. 9, U. S. Comp. Stat. 1901, p. 1567; March 3, 1803, 2 Stat. at L. 229, chap. 27, Sec. 17), declares: 'All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both'; and of this provision it was said in *St. Paul & P. R. Co.*

v. Schurmeir, 7 Wall. 272, 288, 19 L. Ed. 74, 78, *'the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways'."*

CHAPTER XXIII

Against such depredations as are described and referred to in the foregoing chapter, equity offers its time-honored remedy of injunction. So we present this phase of the case under the title:

(31) INJUNCTIVE RELIEF

In Oregon, as elsewhere, in both state and federal courts, the injunction has been used freely for the protection and preservation of water rights. In this case, to deny petitioner injunctive relief, would be to confiscate its property. Consistently through all the years since statehood, Oregon's courts of equity have used the power of injunction to protect the riparian's rights in streams on which his lands border; to prevent destruction of the stream banks that would change the course of the stream on the riparian's land; have compelled restoration of such banks by the party responsible for their impairment; have enjoined the diversion of water from the riparian lands to the present, or even the *future* injury of the riparian proprietor.

In this case the Cement Company has not actually gone upon the lands patented to the petitioner and committed the depredations complained of; but *has* gone close to the thread of the river which defines the boundary dividing the property of the respective parties. It has committed these depredations in the river

bed at a strategic place for the drawing of all of the water to its side of the river, and into its proposed plant.

An examination of Plaintiff's (Petitioner's) "Exhibit 2 and 23," inserted in this brief, (with the explanations given in the record) will inform the court of the natural barriers in the river bed, which make the scene of the dynamiting perfectly situated to accomplish the purpose of the Cement Company. If the blasted rock in the shattered area be removed, and the sides of the excavation be smoothed, and the river bed lowered to a depth of six feet below low water, and the respondents' widening and lowering of its canal connecting this excavation with its proposed electrical plant shall continue, and the plant be installed of the type described by the testimony, then the entire river at any ordinary stage of the water, will be completely at the command of the Cement Company's employee in the cement mill. If the automatic gates at the spillways of the canal be used as contemplated, then the water thus drawn into the canal through this deepened channel, will waste out through the spillway when not used and drawn through the Cement Company's turbines. Or, if the gates be set at a maximum height, the resultant fluctuation in the flow of the stream at petitioner's lands, would make them worthless. Occasionally the flow would be normal, and at other times the waters edge on petitioner's side of the land would be

from a 100 to 150 feet from the petitioner's present boundary.

(32) PETITIONER'S BOUNDARY

Under the title "Oregon Authority on Boundary" we cite the Oregon cases to the effect that when the thread of a non-navigable stream is moved suddenly, the boundaries of the riparian owner's land remain unchanged. Authorities are shown at Appx. 101-3.

That these results will follow from the removal of the blasted rock from the shattered area, with the accompanying change in the canal, is established beyond dispute, if not admitted.

It is unthinkable that petitioner would not be entitled to have its riparian lands, and its riparian rights protected against these depredations.

(33) AUTHORITIES IN SUPPORT OF THE INJUNCTION.

Prior to the issuance of petitioner's patent, to wit: in 1881, the Oregon Court in

Shively vs. Hume, supra,

enjoined the defendants therein from diverting the water which they had changed from its natural course.

In 1886, the year following the issuance of petitioner's patent, the Oregon Court in

Weiss vs. Oregon Iron & Steel Company, supra,

permanently enjoined the interference with the ripar-

ian proprietor's water rights, closing that case with the following paragraph:

> "Nor do we think the objection to the exercise of the jurisdiction well taken. Mr. High says: 'A riparian proprietor owning to the center of a stream is entitled to the aid of equity to prevent a diversion of the waters from their natural channel. Nor does the neglect of complainants to use or appropriate the water-power, or the fact that they have as yet sustained but small pecuniary damage, or that defendants would be subjected to heavy expense if compelled to restore the water to its original channel, present such objections as would warrant a court of equity in refusing the relief.' (High on Injunctions, Sec. 795, and authorities cited.)"

We cite:

Mace vs. Mace,
40 Ore. 586,
65 Pac. 660,
68 Pac. 737 (1902)
(Opinion 587-8).

This suit, was brought in 1899, to restrain the defendant from interfering with the flow of the water of Silvies River across plaintiff's land and through an alleged natural channel. At the upper end of defendant's land there is, and from time immemorial has been, a natural depression, or slough, through which the water has been accustomed to flow, during highwater, onto plaintiff's land. In 1888 defendant, with the consent of plaintiff's predecessors, constructed a ditch through plaintiff's land, to utilize the surplus water for irrigation. And at the same time he cut

the bank of the river at the head of the slough, put in a box or flume, and filled up the depression on either side thereof; and by dams above and below raised the water so that it flowed out of the flume in greater quantities. In 1898 he replaced the flume with a larger one.

This suit was commenced in 1899, to prevent the defendant from interfering with the flow of the water, (Opinion 587-8).

The answer denied the material allegations except plaintiff's land title. He averred that the so-called natural slough was a ditch made by the defendant to turn the water through and over plaintiff's land, and on the lands owned by him below.

The opinion stated there were two questions. (1) Was the slough a natural water course? (2) If so, to what relief is plaintiff entitled? (Page 588).

As to number 1, the Supreme Court decided that the depression was a natural water course (Opinion 589).

The Court said:

(Italics ours)

> "The next question is *as to the decree that should be entered* under the circumstances. The defendant, as a riparian proprietor, is entitled to have the water of the stream flow as it was wont to do under natural conditions, and to that end he has a right to maintain the banks at their usual or natural height: *Cox v. Bernard*, 39 Or. 53 (64 Pac. 860)." Opinion 589-90.

Of the rights of the plaintiff, the Court further said:

"His rights depend alone on the fact that he is a riparian proprietor upon a natural water course, and all that he is entitled to is a decree *restoring* such water course and its intake to their natural condition. The court has no authority in this suit to make a decree allowing or permitting him to maintain a head-gate or flume in the bank of the river on the defendant's land, nor to go upon such land for the purpose of regulating the flow of water. All it can do is to compel the defendant to restore the bank to its natural condition, and permit it so to remain."

"A contention is made that, because the permanent part of the dam put in by the defendant is about two feet high, he is entitled to raise the bank at the head gate at least eighteen inches. But the evidence shows that a very slight raise in the water at the point where the dam is located will cause the stream to flow back and through the West Fork, unless prevented by what is known as the 'Levins Dam,' over which neither party to this suit has any control. *And moreover, as already suggested, the dam is an artificial structure, put into the stream by the defendant, and its future maintenance depends entirely upon his will.*

A decree will be entered here in accordance with this opinion, and the cause remanded to the court below, with directions to *enforce such decree;* plaintiff to recover costs in this court and the court below." Opinion 590-1.

ON REHEARING (591)

The defendant asked the Supreme Court to modify said decree so as to permit him to raise the banks of the stream at the place where he had cut them. The court had directed that he restore the banks. He alleged his purpose in the modification was to be permitted to confine the waters within the channel when it should be

raised by the dams which he had erected. He claimed that during a great portion of the time in the irrigation season the water would not be high enough to run thru the channel; that during such times he could use it for irrigating his riparian lands by raising it through artificial dams. But that in order to do so it would be necessary to close the cut during the times he was so using the water.

The Court said the point had not developed by the testimony, nor did the record show except generally the time of the year when the water would naturally flow to *plaintiff's* lands.

The Court on this rehearing said:

> "This point was not developed by the testimony, nor does the record show, except in a general way, at what time of the year the water will naturally flow down to plaintiff's land. The court below found that annually, from about the first of April to July 15, the water has from time immemorial run down through the natural channel referred to, but as to whether the flow is continuous or not the evidence and findings are silent. If the defendant's position is correct, it would perhaps be equitable and just to allow the desired modification, if, under the facts a decree could be so framed as to protect the rights of the plaintiff. But to permit defendant to determine for himself when he may raise the bank would, it is believed, tend to further litigation, and, in practical effect, destroy the value to the plaintiff of the decree heretofore rendered. If, when the case goes back to the court below for enforcement of the decree, it is made to appear to that court, that a decree can be framed, fixing definitely the date or dates when the defendant can *raise the bank without interfering with the*

rights of the plaintiff, it is authorized, if it deem it proper, to frame such a decree."

In

Phipps vs. Rogue River Valley Canal Company,
80 Ore. 175, 181,
156 Pac. 794, (1916),

the Supreme Court of Oregon held that the infliction of an "Irreparable injury," such as equity will enjoin, includes all the degrees of wrong of a repeated or continuing kind, which produce hurt, inconvenience, or damage that can be estimated only by conjecture, and not by accurate standards of measurement. We quote it at Appx. 112.

The case cites

Bernard vs. Willamette Box & L. Co.,
64 Ore. 225,
129 Pac. 1039,

which upholds the right of a court of equity to grant a mandatory injunction, at the behest of the owner of a lot abutting on a street, for the removal of an elevated roadway in the street, obstructing ingress to and egress from the lot.

In 1901 the Oregon Court in

Cox vs. Bernard,
39 Ore. 53-63,
64 Pac. 860,

held:

That every riparian proprietor of lands on the banks of a natural stream has an equal right to have the water

of the stream continue to flow in its natural course as it was wont to run, without diminution or change, and to the end that he may insure the water coming down to his property. He assuredly has the right to maintain the banks of the stream in their accustomed and natural condition so that the water may not be directed or carried off by reason of washouts, rents or crevasses therein, stating that the rule is well established that a riparian proprietor may protect his premises against overflow of the streams. And that it is reasonable that he may also protect the banks and thereby secure the use of the water that would naturally flow within them. Hence, injunctive relief may be granted. (Quotation at Appendix 114-15).

This is the doctrine of the Washington Court.

In

Rigney vs. Tacoma Light & Power Co.,
9 Washington, 576,
38 Pac. 147,

the Washington Court said:

That the right of the riparian proprietor to the flow of the water is inseparably annexed to the soil, and passes with it, not as a mere easement or appurtenant, but as a part and parcel of it. Use does not *create*, and disuse can not *destroy* or sustain it. That actual damage is not indispensable as the foundation of an action.

It is sufficient to show a violation of a right. The law will then presume some damage.

A quotation is made from the case at Appx. 115.

In

Gould vs. Eaton, (Cal.)
49 Pac. 577-8,
(Cited at Appx. 112)

the Supreme Court of California held that the riparian's right to an injunction does not depend upon the amount of injury which he has received. Being a riparian owner he has a right to the entire flow of the stream, and the *claim* of the defendants that they have a right to divert a portion of the flow, authorizes him to invoke the aid of equity in order *that the claim may not ripen into a right.*

In the Appendix at 112-113 we quote:

Farnham, Waters and Water Rights,
Volume II, page 1722.

Section 530 states the doctrine that a riparian proprietor is entitled to an injunction against obstruction of the banks of the running stream, although he may not be able to show a present damage, on the ground that there is a present injury to the right of property, and may produce serious injury in the future.

At page 113-14 of the Appendix, we cite:

Farnham, Waters and Water Rights, Vol. II,
Page 1771, Section 551.

This text is to the effect that the riparian owner is entitled to the natural flow of the stream given by

nature, which depends solely on the ownership of the banks of the stream, regardless of whether any use has been made of it or not; that the conclusion must necessarily follow that any interference with this right will entitle the riparian owner to redress whether he can show any actual injury or not.

ARGUMENT

The scene of this controversy is on Rogue River, one of the most delightful streams in Oregon. The suit involves the right to the use of the waters of the stream at a place thereon near respondent city.

The petitioner's rights in the stream were conveyed to its predecessor by patent of the United States dated March 11, 1885. These lands border along the east bank of said stream, flowing south, and are on the opposite side of the river from similar property bordering on the stream, owned by the respondents. The lands of the respective parties were patented at a time when the patents carried riparian rights to the use of the waters of the stream. These rights, which are the common law riparian rights, abided in and were a part and parcel of all of these lands, long before the admission of Oregon to statehood. At the time of its admission, Oregon had the right, as has every sovereign state, to adopt the principles of the common law, from whence comes the riparian doctrine, or to renounce these rules of the common law, and by statute create whatever laws it desired to apply, governing the rights of those whose lands bordered on the streams and lakes and other bodies of water in the state.

Not all of the states, upon admission, have adopted the principles of the common law, but Oregon had been settled by pioneers from states accustomed to admin-

ister the common law. Among these pioneers, as the signatures upon Oregon's Constitution will show, were men of renown, well versed in governmental matters.

Prior to statehood, Oregon's affairs were administered according to the principles of the common law, from the earliest settlements.

The settlers of Oregon carried there with them the principles of the common law, so far as suited to their new environment, and by the territorial law of Oregon in force at the time of the adoption of the Constitution, which provided that the common law of England and the principles of equity not modified by the statutes of Iowa, or of this government, and not incompatible with its principles, constituted a part of the law of the land.

By Section 7 of Article XVIII of the Constitution which became effective upon the admission of the state, it was provided that all laws in force in the territory of Oregon when the Constitution should become effective, and consistent therewith, should continue in full force and effect until altered or repealed.

And so, as announced by the Oregon Supreme Court as late as 1926, that court held that it felt as much bound by the applicable rules of the common law, where such rules had not been modified or abrogated by statute, as it did by the statutes themselves. Every early Oregon case after the adoption of the Constitution, and which announced the water right laws applicable to the streams of the state, adhered to and administered the

common law riparian doctrine, save only as modified by the doctrine of *prior* appropriation.

According to the common law, as announced by the decisions, and eminent text writers, these common law principles granted to the owners of the lands bordering on such streams, equal rights in the use of the waters thereof for beneficial purposes. They included rights for irrigation, domestic use, and the manufacture of power.

This stream is a meandered stream, so that under the riparian doctrine, the lands bordering on it followed the meander line of the stream, and for the purpose of computing the acreage in government purchases of land, the ownership extended from this border line, to the thread of the stream. Thus it extended from the edge of the river, half way across the same. So too, the landed proprietor on the opposite bank owned to the same line,—the thread of the stream. Thus the lands of the two stretched across the stream, and there met, so that the east boundary of the land of one, became the west boundary of the land of the other.

After the admission of the state, and on July 26, 1866, Congress passed an act of that date confirming in those who had used the water of these streams upon public lands, the right to continue in that use. Such uses had been common, for all purposes, including mining, but it was universally held by the courts that when a prospective homesteader or other settler entered a piece

of government land intending to comply with the laws of Congress to acquire the same, this act of settlement, resulting in patent, cut off absolutely, as of the date of the settlement, the right to make what is termed an appropriation of the waters flowing over said land. This was a wholesome provision. These pioneers settled along the streams, built their homes, raised their families there, and contributed to the building up of the western citizenship, and the education of its people.

So these rights grew up as a part of the history of the country. Here and there were appropriations for mining purposes, and a few for irrigation. Of course riparian rights carry other values that are due to the fact that the lands lie along the stream, and lands were selected because of their relation to the stream.

In Oregon there has never been, prior to the controversies of which we speak, any exception to the rule that one man could not enter the lands of another and tap the stream on his land and deprive him of the benefits thereof. The right to do this by eminent domain proceedings was allowed in some cases for the general public good. And it was always the law in Oregon that when the land was patented, it carried with it these riparian rights, the priority of which related back to the date of the settlement on the land, by the patentee or his grantee.

There were never any appropriations made to draw from the lands of the petitioner any water whatever,

either before or after the issuance of petitioner's patent. On the opposite side of the river there was an appropriation made of 220 cubic feet per second of water for power purposes. And one McClure acquired 75 second feet of water on petitioner's side of the stream, but above and upstream from the petitioner's land.

In the river that flows between the lands of the respective parties, and over the same, are reefs of bedrock protruding in lines across, and up and down the stream, which divide the waters thereof almost equally, as will appear from petitioner's Exhibit "2 and 23" (which is its designation), inserted in this brief.

In 1909, the Oregon Legislature passed what is termed in the record as the Oregon Water Code. It purported to be a law for inventorying the amount of water in the streams, and determining the relative rights of various claimants thereto, to use the same. In its opening sentence, it expressly provided that all appropriations of water must be made subject to existing rights. The lands of the respective parties, bordering on the river as they did, were riarian thereto, and, had these riparian rights to the use of the water. So that by the first expression in the act, appropriations thereunder were required to be *subject to existing rights*, and not to impair them in any way. It seemed to provide a way for the peaceful and friendly settle-

ment of water controversies. It contained a statement that the actual application of the water to a beneficial use by a riparian proprietor, before the passage of the act, should be *deemed to create* in him a vested riparian right. This was a novel provision. It was always one of the cardinal attributes of the riparian right that such rights could neither be lost by non-user, nor acquired by user. But this provision, which was subdivision 2 of Section 70 of the act, did not provide that the provision defined a vested right. It simply purported to declare the status resulting from beneficial use prior to the enactment. It contained no hint or word that it was the instrumentality whereby the state would destroy these valuable riparian rights in the thousands of acres of splendid land bordering on these streams, simply because they had not been put to a beneficial use, although of course they were of some beneficial use every moment of time, following the settlement upon the land.

This law provided for a system under which a state engineer upon the petition of one or more users on any stream, would survey the streams, whether the people were in controversy over their water rights or not, and haul them into court for a determination of their respective rights to the use of the water. But because the act did not purport to administer the relative rights of these riparian owners who had not used the water before the passage of the act, there was no occasion to

serve process upon such riparian owners. Where ditches and other evidences of irrigation or similar use were upon the land, service was made The streams were adjudicated under the act.

The respondent city had acquired the McClure right, and it did acquire the right on the land opposite that of the petitioner. These were rights by appropriation. A decree was given to the city as the successor of the original claimants for these two appropriations. The owner of petitioner's lands was not served with process, and made no appearance in the case. Under the act as construed by the Oregon Court In Re Willow Creek, the owner of petitioner's land, not being a party to the suit, was not bound by the terms of the adjudication decree. There was no occasion to serve him. The rights were patent. The law establishing the nature and character of the rights was settled, and the owner of the petitioner's lands had a right to enjoy the property which he had in these riparian rights. This was his property.

Matters continued in this condition until the respondent cement company, after years of inactivity, began to purchase considerable power from the petitioner, a public utility, engaged in the general sale and distribution of power there.

In 1926, at about the same time, the cement company and the petitioner bid for the purchase of the city's riparian lands, and the city's small power plant. The

petitioner offered the city $40,000.00 in cash, and power for its municipal uses at a rate entirely satisfactory to the city. The cement company offered only $22,500.00, payable in monthly payments of $100.00 each, plus a similar contract for power. The charter of the city was amended to permit the sale, and the cement company's proposition was accepted, due doubtless to the fact that the little town was a company town, and the cement plant was adjacent to its corporate limits, and furnished employment for many of its citizens.

The cement company, by written contract of purchase, Exhibit A to Respondents' answer, acquired the city's property and its State Engineer's Permits to appropriate water from the stream, upon said partial payment plan. And at the time of trial, said monthly payments had continued, which, calculated to the present time, would perhaps amount to $10,000.00. Under the law of Oregon, cited, the situation creates the cement company the equitable owner, the party in interest, leaving the city the possessor of the legal title as security for the balance of the purchase price.

But the cement company planned, in the purchase of this property, to, through said permits, issued by the state engineer, appropriate sufficient water to make 1347 cubic feet per second, which, according to the evidence, is more than twice what the river flows at its low stage. It is about the average normal flow. In floods, there is of course much more water in the stream.

Shortly after the cement company's purchase, namely on October 5, 1926, it brought suit against the petitioner, in the circuit court of the county, and in the name of the city, thereby using the city's power of eminent domain, to condemn nine acres of petitioner's said lands, upon which to build a portion of the eastern end of its proposed dam for the diversion of the water from petitioner's land, to the west side of the river, into the site of its proposed power plant. Its plan was to build an electric plant at that point, and transmit the power to its cement mill, a distance of less than a mile. Of course the result of that would have been to have entirely destroyed the value of petitioner's land, established at $30,000.00 for power purposes.

The petitioner required the property for the purpose of erecting thereon what is known in the power business, as a stand-by plant. At this time the petitioner had built, and was building in the adjacent mountains, plants for the manufacture of sufficient power to supply the users in the Rogue River Valley, served through its distributing plant on said river, situated some two or three miles upstream from the site of this controversy.

The predecessors of petitioner in the power business were the original manufacturers of power in the territory. Through the use of this power, the country had grown and been settled up, increasing the demand for power to such an extent that larger plants were built.

Long transmission lines were brought through the mountains to the distributing point. These transmission lines were subject to injury resulting from mountain storms, fire, and other hazards which interrupt the service. So, to keep pace with the development which it had helped to make, and to comply with the public service requirements as to service, it became necessary to construct this stand-by plant of sufficient capacity to furnish power to the consumers in the immediate vicinity, temporarily during these periods of breakdown. When the petitioner was ready to proceed with this development, estimated to cost three-quarters of a million dollars, it determined to acquire, by purchase, if possible, the riparian lands and the general situation controlled by the city, and to build a larger plant, which would not only act as a stand-by plant, but make a surplus of power so as to become a paying unit in its system. Hence the bargaining for the property.

The cement company lost the suit to condemn, because the jury decided that the petitioner needed the property for its public purposes. This, however, did not stop the cement company from its effort to acquire the petitioner's property for nothing. The condemnation suit went to judgment on June 13, 1928. Shortly thereafter, the cement company began to build trackage from its riparian lands, across onto petitioner's property, which it had sought to condemn. And it actually

began the erection of a concrete pier of substantial dimensions on petitioner's property, claiming the right to do so under an abandoned easment.

September 13, 1928, the petitioner instituted suit against the respondents to stop the trespass, and this case went against the respondents and they appealed to the Court of Appeals from the District Court of Oregon. The decree enjoining the construction was affirmed there, but modified slightly, and a decree based on the mandate was entered, as alleged in the complaint, and admitted in the answer, on the 20th day of December, 1929, permanently enjoining the respondents from further trespassing upon petitioner's riparian lands. That decree has never been modified, and is final.

Within about six months after the entry of that decree, there was an explosion in the river just over the meander line on the respondents' side of the stream, and two hundred charges of dynamite were exploded by the cement company in a line of drilled holes in the river bed, so placed as to shatter the rock bottom of the river for a distance up and down stream of about 200 feet, and a width of about thirty feet, and to a depth of about six feet below the surface of the river at low water. There is no dispute about the purpose of this action. It is admitted in the record that the purpose was to create a deep channel there which would draw the full amount of the water represented by the per-

mits,—1347 cubic feet per second,—through that race at all times when there was that quantity water available in the river. This of course at once precipitated an additional suit, which is the present one.

The dynamiting occurred on the 21st day of July, 1930, and the suit was filed, and further depredations enjoined, in the District Court of Oregon on the 26th of the month. It is the admitted intention of the cement company to remove the blasted rock from this shattered area, continue its operations already begun for the widening and deepening of the canal that connects with this new opening to be made, and so draw from the petitioner's land all of the water in the river to the capacity of the race so made.

The place at which the river bed was shattered is strategically located for the purpose of drawing this water from petitioner's land into the site of the cement company's proposed electric plant.

It was admitted in the case that the city's 220 second feet would flow naturally into this power site, without the removal of any of the rock from the shattered area. And, while petitioner does not concede the right to use the McClure 75 second feet on the west side of the river, since the decree of adjudication requires it to be returned to the stream on the east side of the river, above petitioner's land, still the undisputed testimony is that that 75 second feet, plus the 220 second feet, naturally flows into the site of the power plant without

the removal of any of the shattered rock from the dynamited area. So that from no point of view has the city any interest in the removal of the blasted rock, nor in the cement company's acquiring petitioner's rights to the use of the water.

Mr. Muirhead of the cement company took full responsibility for the drilling, and superintended the exploding of the dynamite. He testified that the carrying out of his plan would leave about 122 second feet of water on the petitioner's side of the river. He said that it would take about that much for a fish-way, and he understood the law required the building of fish-ways for the passage of fish on their migration past the power plant. So that, entirely in disregard of the petitioner's rights in the matter, the cement company would not only take the water from petitioner's land and leave a dry river bed between its western boundary and the thread of the stream, (as it would when thus changed) but it would use petitioner's land for the fish-way which the law requires those so obstructing the river to build and maintain.

It is admitted that the cement company does not have the powers of a utility, but it is a private corporation. Yet the cement company's testimony shows that such power as it made in excess of its mill requirements, it would sell and dispose of in the market. It urges that it is paying a large price to the petitioner for power used in cement manufacture, but it is probably equally

true that the operation is profitable, or it would not be carried on.

Of course a utility must have some good customers if it is to supply power to the smaller ones at reasonable rates. So far, therefore, as the equities are concerned, it seems to us that they are on the side of the petitioner. It seems that the suit is unnecessary, and grows out of a desire to acquire petitioner's riparian right to the use of the water, without compensation, and to take it and use it in competition with the petitioner, in a business which is solely the business of the petitioner, and which the respondent cement company is not qualified to perform.

The cement company claims no other right to commit these depredations and to take this water except through the incompleted permits of a state engineer, which have been issued *subject to existing rights.*

The authorities cited are to the effect that such permits are without value from the standpoint of being property. A very large proportion of them, as said by this court, never ripen into real appropriations. At best they are mere options, or, as some courts say, evidences of an intention, or proposed intention, to appropriate water.

The Oregon Court has construed this Section 1 of the Water Code, as not granting to any permit holder the right to enter upon another's land for the purpose of establishing facilities for the appropriation of water.

This, the court says, can only be acquired for public purposes and in compliance with the constitution.

The Appellate Court affirmed the judgment of the District Court, the result of which is to dissolve the existing injunction and permit the blasted rock to be removed, and petitioner's riparian rights confiscated. The majority opinion in the case followed the purported doctrine of a 1924 Oregon case holding that said subdivision 2 of Section 70 of the Code had destroyed all riparian rights that had not been used when the code was adopted, but preserving those rights which had been used at that time, and to the extent of the use that had been made. The act carried an emergency clause, the result of which was to put it instantly into effect upon its approval by the Governor. Some states having the same riparian doctrine as prevails in Oregon, have sought to change the law respecting riparian rights so as to require them to be put to a beneficial use within a certain time. But, as expressed in the dissenting opinion of Mr. Justice Wilbur, in this case, construction of the water code in such a manner as to destroy petitioner's water rights and permit them to be adversely acquired by the cement company, is to take the property from one and give it to another, and that there is no authority for such taking. He expressed the opinion that as the respective parties alike enjoy riparian rights, the cement company, if it desired to take petitioner's rights, should disclaim any intention of acquir-

ing an adverse right and compensate the petitioner justly, as might be determined by the court, for the power manufactured from petitioner's water, until such time as petitioner is ready to use its one-half of the flow, less the 220 second feet.

In the former case the opinion of the appellate court stated that, whatever may be the rule in Oregon touching riparian rights, the pleading is inadequate and the time is premature for a sweeping adjudication in respect to the relative rights of the parties under the doctrine of riparian rights; that apart from rights that might be acquired by appropriation in Oregon, on the assumption that the common law rule prevails without qualification, the respondents, as riparian owners, would have the same right of use which might turn out to be inconsistent with a portion of the decree if given the extreme interpretation put upon it by the plaintiff (petitioner).

The Oregon decisions, for instance In Re Willow Creek, are to the effect that the settler upon an Oregon stream may adopt either the riparian doctrine or the doctrine of appropriation for the use of water. But that he cannot in the same case, or controversy claim both rights by appropriation and riparian rights for the use of the same water, because they are inconsistent claims. So that the cement company, desiring to take all of the water at the medium stage of the river, and therefore being unwilling to claim as a riparian

proprietor, in each of the three suits claimed solely under the doctrine of appropriation. Petitioner never disputed the City's right to the 220 and the 75 second-feet that had been acquired under appropriations by the City's predecessors. The McClure appropriation was made before any of the lands involved herein were patented.

But evidently the cement company was unwilling to take the suggestion made as to the pleadings in the former case, resulting in the dynamiting of the stream bed.

On May 18, 1796, Congress passed an act, still in force, in which it is provided that in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and bed thereof shall become common to both. This is in accordance with the riparian common law doctrine that entitles the riparian proprietors to have said streams, upon which their lands border, flow in their natural channel, at their usual height, and undiminished in quantity or quality, except such as might result from use by other riparian proprietors similarly situated.

So, while the respective parties here own to the center of the stream, and own the land under the water to the thread thereof, *still, the entire stream, and the entire stream bed is common to both.*

Petitioner contends that it could build a stream-flow plant on its own side of the river, but would prefer

utilizing the water by an impounding dam so as to make its plant do its service as a stand-by plant, and at the same time make a profit, or at least take care of its fixed charges.

An interesting solution is suggested in the dissenting opinion. The petitioner believes that competent testimony could be submitted to the District Court to establish a fair basis upon which most of the water could be used for the manufacture of power consistent with the preservation of the petitioner's riparian rights.

As to the law of the case, the constitutionality of the water code was before the Oregon Supreme Court and decided in 1915,—six years after the enactment of the code. Immediately following, the same question was decided by this court. In both opinions reference was made to the provisions of Section 1 of the code and of Subdivision 1 of Section 70 of the act, each of which provides for the preservation of existing and vested rights. Both the state court and this court decided that it was the intention of the legislature to protect these vested rights. The Oregon Court went at length into the history of the riparian doctrine and the nature and quality of the riparian right. And it said that rights both of appropriation and by the riparian doctrine could exist in the same community. This seemed to settle the question. This court apparently accepted the language of the statute at face value, and the decision of the Oregon court as a real expression of intention as

to the administration of the law. Following that, in 1921, the Oregon Court determined that an Oregon statute which impaired a vested riparian right, violated the Oregon Constitution against taking of private property without compensation. It was then, a few months after that decision, that the petitioner acquired its property in controversy. The established law then was that the riparian rights vested in the land upon the issuance of the patent, and the priority thereof related back to the settlement on the land. When petitioner's patent was issued, there was no doubt expressed in any of the Oregon courts as to this doctrine. Nothing ever occured thereafter to deprive the owner of that land of the riparian rights which abide in it, and which are parts of it. But in 1924 the Hood River case was decided, in which the Oregon Court held that subdivision 2 of Section 70 destroyed the vested riparian rights that had not been used before the enactment of the Code. At the same time, in the Norwood Case, the same court reaffirmed the riparian doctrine and said that it had always been administered and adhered to in Oregon. Then in 1928, the Oregon Court decided the Harris case, which recited in detail the attributes of the riparian right; adopting the language of the Weiss case decided in 1886, wherein the whole subject of the riparian doctrine was reannounced.

Apparently the Appellate Court gleaned the idea from the Hood River case that the Oregon Court had

determined at all hazzards to overturn the riparian doctrine in Oregon. We say this because twice in the majority opinion herein, it is quoted that the court had the assurance of the Oregon Court in the Hood River case that the common law riparian doctrine "would take the heart out of" the Water Code. We visualize the scene as it appeared to the Appellate Court, finding in the reading of the Hood River case the following:

The prevailing opinion of Mr. Justice Bean; the concurring opinion of Mr. Justice McBride; the concurring opinion of Mr. Justice Coshow; the dissenting opinion of Mr. Justice McCourt, in which Mr. Justice Brown concurred; Mr. Justice Burnett's opinion concurring with the dissenting opinion of Mr. Justice McCourt, and the opinion of Mr. Justice Brown specially concurring in the dissenting opinion of Mr. Justice McCourt, covering a range in all of pages from 125 to 259.

In this conference we see Mr. Justice Burnett about to decide, or having just decided, the Norwood case, in the opinion in which it was announced that the title to the land of the defendant in that case

> "carried with it the common law riparian rights *which have always been recognized in this state.*"

And out of this battle came the discovery that Subdivision 2 of Section 70 defined the vested riparian rights as those which had been applied beneficially before the adoption of the Code. It seemed to have been forgotten that the author of the prevailing opinion in

the Hood River case had written the opinion in the Willow Creek case, in which it was announced that both the common law riparian doctrine and the doctrine of appropriation could exist in the same community, and that the Water Code did not impair vested rights to the use of water. It seemed to have been forgotten that in the consideration of that case by this court, this court read the statute as it is, and construed it as protecting the vested rights to the use of the waters of the state.

But apparently because it had been held nine years after the writing of the Willow Creek opinion that the riparian doctrine would take the heart out of the Water Code, the Appellate Court felt bound to follow that doctrine in that case, instead of the reannouncement in the Norwood case *of the very opposite legal rule.*

But is it correct that the riparian doctrine takes the heart out of the Water Code? Go over the adjudications had under that Code as carefully as we may, and we find that the court has administered the common law riparian rights along with the rights by appropriation. True, in various ways riparian proprietors have come out of the adjudication with rights by appropriation, rather than with their riparian rights. But until the Hood River case, the Oregon court had always *given assurances* that the riparian doctrine was maintained.

Those cases ought now to be considered in the good faith in which their announcements were accepted. Con-

strued as it was construed when petitioner acquired its property, the Code was a perfectly legal and constitutional document, fully protecting, with the assurance of the Oregon Court and this Court, the riparian right which abided in petitioner's land as a vested right.

When is it that a court determines, in construing a statute the intention of the legislature in its enactment? Six years after the Code's enactment as expressed in the Willow Creek case, the intention was to protect the vested rights of the riparian proprietor. As construed nine years later, fifteen years after the enactment of the Code, it is interpreted as defining a vested riparian right to be *only* such as had been put to a beneficial use before the adoption of the Code. Is this the consistency upon which the validity of titles is, by "the law of the land" made to depend?

And eight years after this discovery in the Hood River case, it is held for the first time in the history of the enactment, that the Water Code, by the exercise of the *"police power"* of the state *"validly abrogated"* the common law riparian doctrine in Oregon. It was announced in the Willow Creek case in 1915 that to a *limited extent* the Act was the exercise of the police power, and it tied that allegation to the provisions dealing with the adjudication of water rights, and not with the question with which we are concerned. In the Hood River case the police power was not mentioned.

And eight years after the Hood River case the dis-

covery is made that the Legislature used the strong arm of the state, the police power, which is over and above every other power of its sovereignty, to destroy the vested riparian rights that had abided in the riparian lands since the dates of their patents respectively.

At what point in time after the passage of an act do courts discover that the legislature had exercised this subtle power?

California after thus administering for many years the riparian doctrine, with slight modification from the Oregon doctrine, attempted to seriously impair the riparian right by the Water Commission Code of 1913. Over and again its provisions came before the Supreme Court of that state, and consistently it pushed the cup aside, and refused to so far violate the 14th Amendment of the Federal Constitution, as to overturn the titles that throughout these years had depended upon the faith and credit to be given to the decisions of that court. Following that, as we learn from the opinion here, and from the cases, the California Constitution was amended to declare the policy of the state in the matter of the regulation of the use of its waters, and it has now embarked upon the task of using that amendment to regulate and govern the uses of water consistently with the constitutional guarantees that are behind the titles.

January 31 of this year the Supreme Court of California, in *Peabody vs. City of Vallejo*, constru-

ing the California Constitutional Amendment, held:

There should be no endeavor to take from a water right the protection to which it is justly entitled; that the preferential and paramount rights of the riparian owner, and the owner of an under-ground or percolating water right, and the *prior* appropritor, are entitled to the protection of courts at law or in equity; that when there is no substantial infringement of the right —that is, when there is no material diminution of the supply by reason of the exercise of a subsequent right, the owner is entitled to a judgment declaring his preferential and paramount right, and enjoining the assertion of an adverse use which might otherwise ripen into a prescriptive right. That any use of an appropriator which substantially damages such right, taking into consideration *all of the present and reasonably prospective recognized uses*, is an impairment of the right for which compensation must be made, either in money or in kind, and if the public use has not attached, the owner of the paramount right is entitled to injunctive relief. This comes out of the Constitutional Amendment of 1928.

Here we have no statute such as the California Water Commission Act, nor any constitutional provision like the California Amendment.

But the Appellate Court has gone further than all the rest, and, without the aid of a constitutional amendment, overturned the petitioner's vested rights under

the authority of the police power, which doctrine had not been invoked by the state. And this, in the face of the fact, as the briefs and the records will show, that the subject had never been mentioned in the consideration of this case from the date on which it was begun, until it had finally been submitted to the Appellate Court for decision.

This is the language of the prevailing opinion, from R. 450, Federal 569:

> "We conclude then, that the riparian owner's right to the natural flow of the stream substantially undiminished has been validly abrogated by the Water Code of 1909 as construed by the Oregon court. Plaintiff's assertion of such a right in this case cannot, therefore, be sustained."

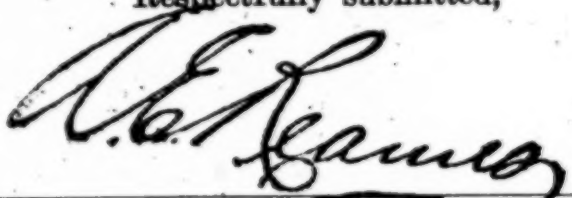
The controversy is one, by the decision of which the public will be greatly benefitted. If the riparian doctrine is to be done away with in Oregon, this should be accomplished in an orderly, constitutional manner. It has never been the constitutional way to take one man's property by the strong arm of the law and give it to another. As was said by Mr. Justice McBride, in Hansen v. Thornton, in the Oregon Court in 1919:

> "One who purchases land abutting upon a lake or water-course, usually considers his right of access to such waters as an element of value in the purchase. When we speak of riparian rights, we are not considering a mere shadowy privilege but a substantial property right, the right of access to and a *usufruct* in the water. To say that the owner of such a right may without his consent be deprived of it by the state or the general government

> permitting some other person to obtain title to the accretion formed by an impounding or diversion of part of the waters that previously washed the shore of his land does not appeal to our sense of justice and we do not believe that the authorities generally support such a doctrine."

Throughout the Oregon judicial history, its courts of equity have never failed to protect the rights of the riparian proprietor against destruction and impairment of the channel and banks of the streams, as is abundantly shown in the authorities cited.

Respectfully submitted,



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APPENDIX

GENERAL LAWS OF OREGON

1909

WATER CODE

Chapter 216.

AN ACT

Providing a system for the regulation, control, distribution, use, and right to the use of water, and for the determination of existing rights thereto within the State of Oregon, providing penalties for its violation and appropriating money for the maintenance thereof, and declaring an emergency.

Be It Enacted by the Legislative Assembly of the State of Oregon:

Be It Enacted by the People of the State of Oregon:

Section 1. Subject to existing rights, all waters within the State may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, or corporation, or association, to any water.

Section 2. Water Divisions.—The State of Oregon is hereby divided into two water divisions, as follows:

Water Division No. 1 shall consist of all the lands embraced within the following counties, to-wit: Benton, Clackamas, Columbia, Clatsop, Coos, Curry, Douglas, Josephine, Jackson, Klamath, Lake, Lane, Linn, Lincoln, Marion, Polk, Multnomah, Tillamook, Yamhill and Washington.

Water Division No. 2 shall consist of all the lands embraced within the remaining counties of the State.

Section 3. Division Superintendents, Appointments and Term of.—There shall be one superintendent for each water division, who shall, immediately after this act becomes effective, be appointed by the governor to serve until January 1, 1911, or until his successor is appointed or elected and shall have qualified, and who shall be a resident of the water division for which he is appointed. At the general election in 1910, and every

four years thereafter, there shall be elected by the voters of the counties of the first and second water divisions of the State a division superintendent, each of whom shall hold office for the term of four years, or until his successor is elected and qualified. Each of said water superintendents shall have knowledge and experience relative to the irrigation law and its administration, and measurement of flowing water, evaporation, seepage, and common alkalies, drainage and hydrographic features of the water division in which the candidate may reside.

Section 4. Duties.—Said division superintendent shall have general control over the water masters of the several districts within his division. He shall execute the laws relative to the distribution of water, and perform such other functions as may be assigned to him. He shall have authority to make such reasonable regulations to secure the equal and fair distribution of water in accordance with the determined rights as may be needed in his division. Such regulations shall not be inconsistent with the laws of the State.

Section 5. Appeal From.—Any person, association, or corporation who may deem himself, or, itself aggreived by any such order or regulation of such division superintendent shall have the right to appeal from the same to the Board of Control by filing with it a copy of the order or regulation complained of and a statement of the manner in which the same injuriously affects the petitioner's interest. The board shall, after due notice, hear whatever testimony may be adduced by the petitioner, either orally or by affidavit, and shall have the power to suspend, amend or confirm the order complained of.

Section 6. Water Division Superintendent and Compensation Of.—Each division superintendent shall receive a salary of two thousand four hundred dollars per annum, in full compensation for all his services, and shall in addition thereto be paid his actual traveling expenses when called away from home in the performance of his duties. Such salary and expenses

shall be paid at the same time and in the same manner as those of other State officers. Such division superintendents shall not engage in any other business.

Section 7. Oath and Bond.—Before entering upon the duties of his office, each division superintendent shall take and subscribe an oath faithfully to perform the duties of his office, and file with the Secretary of State said oath and his official bond in the penal sum of five thousand dollars, with surety, or sureties, to be approved by the Governor, and conditioned for the faithful discharge of the duties of his office.

Section 8. State Engineer.—As soon as possible after this act shall become effective a State Engineer, technically qualified and experienced as an hydraulic engineer, shall be appointed by the Governor. He shall hold his office until January 1, 1911, unless sooner removed by the Governor for cause, and until his successor shall have been elected and shall have qualified. At the general election held in November, 1910, and every four years thereafter, there shall be elected a State Engineer by the voters of the State, whose term of office shall be four years, and until his successor is elected and qualified. He shall receive a salary of $2400.00 per annum and actual necessary traveling expenses while away from his office in the discharge of official duties, payable as other State officers are paid. He shall perform such duties as are prescribed by law, and may employ assistants and purchase materials and supplies necessary for the proper conduct and maintenance of his department in pursuance of appropriations as made from time to time for such purposes.

Section 9. Board of Control.—The State Engineer and the superintendents of the two water divisions shall constitute a Board of Control, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State, and of their appropriation, distribution, and diversion, and of the various officers connected therewith. The decisions of said board shall be subject to appeal to the circuit and

supreme courts, which appeal shall be governed by the practice in suits in equity, unless otherwise provided herein. Said board shall have an office in the Capitol at Salem, and shall hold two regular meetings each year for the transaction of such business as may come before it, the first of said meetings to begin on the second Wednesday in April and the second on the third Wednesday in November. The State Engineer shall be ex-officio president of said board, and shall have a right to vote on all questions coming before it. A majority of said board shall constitute a quorum to transact business. The board shall have power to adjourn meetings from time to time, and to meet in special session at the call of the president, or of any two members. Notice of any special meeting must be given by registered mail to each member three days before the date thereof, but such meeting may be held at any time when all members of the board are present.

Section 10. Secretary and Other Assistants; Salary. —The Board of Control shall have authority, with power of removal, to appoint a secretary, who shall receive a salary of twelve hundred dollars per annum. He may be required by the board to furnish such bond as it may deem necessary, for the faithful performance of his duties. The duties of the secretary shall consist in keeping a full, true, and complete record of the transactions of the Board of Control, and he shall certify, under seal, all water right certificates made according to law. He shall perform such other duties as may be imposed by law or required of him by the board. Said board shall also have the power to employ such other assistants and purchase materials and supplies as may be necessary for the proper conduct of its business.

Section 11. Determination.—Upon a petition to the Board of Control, signed by one or more water users upon any stream, requesting the determination of the relative rights of the various claimants to the waters of that stream, it shall be the duty of the Board of Control, if, upon investigation, they find the facts and conditions are such as to justify, to make a determin-

ation of the said rights, fixing a time for beginning the taking of testimony and the making of such examination as will enable them to determine the rights of the various claimants. In case suit is brought in the circuit court for the determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the Board of Control for determination as in this act provided.

Section 12. Notice of Proceedings.—The board shall prepare a notice, setting forth the date when the engineer will begin an investigation of the flow of the stream and of the ditches diverting water therefrom, and a place and a time certain when the superintendent of the water division in which that stream is situated, shall begin the taking of testimony as to the rights of the parties claiming water therefrom. Said notice shall be published in two issues of one or more newspapers having general circulation in the counties in which such stream is situated, the last publication of said notice to be at least thirty days prior to the beginning of taking testimony by said division superintendent, or for the measurement of the stream by the State Engineer, or his assistant. The superintendent taking such testimony shall have the power to adjourn the taking of testimony from time to time and from place to place to suit the convenience of those interested.

Section 13. Notice to Claimants.—It shall be the duty of said division superintendent to send by registered mail to each person, firm or corporation, hereinafter to be designated as claimant, claiming the right to the use of any of the waters of said stream, and to each person, firm or corporation owning or being in possession of lands bordering on and having access to said stream or its tributaries, insofar as such claimants and owners and persons in possession can reasonably be ascertained, a similar notice setting forth the date when the State Engineer or his assistant will begin the examination of the stream and the ditches diverting the waters therefrom, and also the date when the super-

intendent will take testimony as to the rights to the water of said stream. Said notice must be mailed at least thirty (30) days prior to the date set therein for making the examination of the stream or the taking of testimony.

Section 14. Statement of Claimant.—The division superintendent shall, in addition, inclose with said notice a blank form on which said claimant or owner shall present in writing all the particulars necessary for the determination of his right to the waters of the stream to which he lays claim, the said statement to include the following:

The name and postoffice address of the claimant.

The nature of the right or use on which the claim is based.

The time of initiation of such right or the commencement of such use, and if distributing works are required.

The date of beginning of construction.

The date when completed.

The date of beginning and completion of enlargements.

The dimensions of the ditch as originally constructed and as enlarged.

The date when water was first used for irrigation or other beneficial purposes, and if used for irrigation, the amount of land reclaimed the first year, the amount in subsequent years, with the dates of reclamation, and the amount and general location of the land such ditch is intended to irrigate.

The character of the soil and the kind of crops cultivated, and such other facts as will show a compliance with the law in acquiring the right.

Section 15. Statement To Be Under Oath.—Each claimant or owner shall be required to certify to his statements under oath, and the superintendent of the water division in which the testimony is taken is hereby authorized to administer such oaths, which shall be done without charge, as also shall be the furnishing of blank forms for said statement.

Section 16. Testimony Taken by Division Superintendent.—Upon the date named in the notice provided for herein for the taking of testimony, the division superintendent shall begin the taking of such testimony and shall continue until completed. In case the division superintendent of any water division is directly or indirectly interested in the water of any stream of his division, or is prevented by illness or otherwise from the taking of such proofs, the taking of testimony so far as relates to said stream shall be under the direction of any other member of the Board of Control.

Section 17. Fees.—At the time of the submission of proof of appropriation, or at the time of the taking of testimony for the determination of rights to water, the division superintendent shall collect from each of the claimants or owners a fee of one dollar for the purpose of recording the water right certificate, when issued, in the office of the county clerk, together with the additional fee of fifteen cents for each acre of irrigated lands up to and including 100 acres, and five cents per acre for each acre in excess of 100 acres up to and including 1,000 acres, and one cent for each acre in excess of 1,000; also 25 cents for each theoretical horsepower up to and including 100 horsepower, and fifteen cents for each horsepower in excess of 100 up to and including 1,000 horsepower, and five cents for each horsepower in excess of 1,000 horsepower up to and including 2,000 horsepower, and two cents for each horsepower in excess of 2,000 horsepower, as set forth in such proof, the minimum fee, however, for any claimant or owner in such cases to be $2.50, also a fee of five dollars for any other character of claim to water. All fees collected by the division superintendent shall be accounted for at the following regular meeting of the Board of Control and paid by such board into the general fund of the State Treasury, except, however, those fees due, or to be paid to the county clerk. But in cases of appropriations of water made under a permit issued under the provisions of this act, only one dollar recording fee above provided shall be so collected by the division superintendent.

Section 18. Notice Upon Completion of Testimony.—Upon the completion of the taking of testimony by the division superintendent, it shall be his duty at once to give notice by registered mail to the various claimants that at a time and place named in the notice not less than ten days thereafter, all of said evidence shall be open to inspection of the various claimants or owners, and said superintendent shall keep said evidence open to inspection at said places not less than ten days, and such other time as fixed in the notice. Said superintendent shall also state in said notice the county in which the determination of the Board of Control will be heard by the circuit court; provided, that said cause shall be heard in the county in which said stream or some part thereof is situate.

Section 19. Contests.—Should any person, corporation or persons owning any irrigation works, or claiming any interest in the stream or streams involved in the determination, desire to contest any of the rights of the persons, corporations or associations, who have submitted their evidence to the superintendent as aforesaid, such persons, corporations or associations, shall within five days after the expiration of the period as fixed in the notice for public inspection, notify the superintendent in writing, stating with reasonable certainty the grounds of their proposed contest, which statement shall be verified by the affidavit of the contestant, his agent or attorney, and the said division superintendent shall notify the said contestant and the person, corporation or association, whose rights are contested, to appear before him at such convenient place as the superintendent shall designate in said notice.

Section 20. Hearing.—Said superintendent shall also fix the time and place for the hearing of said contest, which date shall not be less than thirty nor more than sixty days from the date the notice is served on the party, association or corporation, which notice and returns thereof shall be made in the same manner as summons are served in civil actions in the circuit courts of this state. Superintendents of water divisions

shall have power to adjourn hearings from time to time upon reasonable notice to all the parties interested, and to issue subpoenas and compel the attendance of witnesses to testify upon such hearings, which shall be served in the same manner as subpoenas issued out of the circuit courts of the State, and shall have the power to compel such witnesses so subpoenaed to testify and give evidence in said matter, and said witnesses shall receive fees as in civil cases, the costs to be taxed in the same manner as are costs in suits in equity. The evidence in such proceedings shall be confined to the subjects enumerated in the notice of contest.

Section 21. Contests; Deposit Required.—The superintendent shall require a deposit of five dollars from each party for each day he shall be so engaged in taking evidence of said contest. Upon the final determination of the matters by the Board of Control, an order shall be entered directing that the money so deposited shall be refunded to the persons, associations or corporations in whose favor such contest shall be determined, and that all moneys deposited by other parties therein shall be turned over by the superintendent to the Board of Control, who shall pay the same into the general fund of the State Treasury upon adjournment of each regular meeting of the board.

Section 22. Evidence Transmitted.—Upon the expiration of the period for which the evidence is kept open for inspection, the evidence in the original hearing before the superintendent, and the evidence taken in all contests, shall be transmitted by the superintendent to the office of the Board of Control in person, or by registered mail. Such evidence shall thereupon be filed with the board.

Section 23. Measurements of Streams and Ditches.—It shall be the duty of the State Engineer, or some qualified assistant, to proceed at the time specified in the notice to the parties on said stream to make an examination of said stream and the works diverting water therefrom, said examination to include the measurement of the discharge of said stream and of the carry-

ing capacity of the various ditches and canals, and examination of the irrigated lands; and an approximate measurement of the lands irrigated or susceptible of irrigation from the various ditches and canals; and to take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested; which said observation and measurement shall be reduced to writing and made a matter of record in his office, and it shall be the duty of the State Engineer to make or cause to be made a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy the course of said stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or which are susceptable of irrigation from the ditches and canals already constructed.

Section 24. Order Determining Water Rights.—As soon as practicable after the compilation of said data, and the filing of said evidence, it shall be the duty of the Board of Control to make, and cause to be entered of record in its office, an order determining and establishing the several rights to the waters of said stream. As soon as practicable thereafter a certified copy of said determination shall be filed in the office of the county clerk of each county in which said stream, or any part thereof or any tributary, is situated, and the original evidence filed with the Board of Control shall be certified by the clerk of the board and, together with a certified copy of said determination, shall be filed with the clerk of the circuit court by which court such determination is to be heard. The determination of the board shall be in full force and effect from the date of its entry in the records of the board, unless and until its operation shall be stayed by a stay bond as provided for by this act. Upon the filing of the evidence with the circuit court of the county in which the determination is to be had, the board shall procure an order from said circuit court, or any judge thereof, fixing the time at which the determination shall be heard in said court. Copies of this order, certified by the clerk of said court,

shall be filed by the board as soon as practicable in the office of the county clerk of each county in which said determination is filed.

Section 25. Water Right Certificate.—Upon the final determination of the rights to the waters of any stream, it shall be the duty of the secretary of the Board of Control to issue to each person, association or corporation represented in such determination a certificate to be signed by the president of the Board of Control, and attested under seal by the secretary of said board, setting forth the name and postoffice address of the owner of the right; the priority of the date, extent and purpose of such right; and if such water be for irrigation purposes, a description of the legal subdivisions of land to which said water is appurtenant. Such certificate shall be transmitted by the president, or other member of the Board of Control, in person or by registered mail, to the county clerk of the county in which such right is located, and it shall be the duty of the county clerk upon receipt of the recording fee of one dollar collected as hereinbefore provided, to record the same in a book especially prepared and kept for that purpose, and thereupon immediately transmit the certificate to the respective owners.

Section 26. Court Procedure.—From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be as nearly as may be like those in a suit in equity, except that any proceedings, including the entry of a decree, may be had in vacation with the same force and effect as in term time. Within thirty days from the filing of such evidence and order in the circuit court, or within such further time as the court may for good cause allow, any party may file exceptions to the determination. If no exceptions shall be filed, the court shall on the day set for hearing enter a decree affirming the determination of the board.

All parties may be heard by counsel upon the consideration of the exceptions. The court may, if necessary, remand the case for such further evidence to be

taken by the superintendent of the water division as it may direct, and may require a further determination by the board. After the hearing, the court shall enter a decree affirming or modifying the order of the Board of Control. Upon the hearing, the court may assess and adjudge against any party such costs as it may deem just. Appeals may be taken to the supreme court from such decrees in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within sixty days from the entry of the decree.

Section 27. Clerk Shall Transmit Transcript to Clerk of Board.—The clerk of the circuit court, immediately upon the entry of any decree by the circuit court or by the judge thereof, shall transmit a certified copy of said decree to the secretary of the Board of Control. The secretary shall immediately enter the same upon the records of such office and the State Engineer shall forthwith issue to the superintendent or superintendents of water divisions instructions in compliance with the said decree, and in execution thereof.

Section 28. Distribution.—During the time the hearing of the order of the Board of Control is pending in the circuit court, and until a certified copy of the judgment, order or decree of the circuit court is transmitted to the Board of Control, the division of water from the stream involved in such appeal shall be made in accordance with the order of the board.

Section 29. Stay Bond.—At any time after the determination of the board has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond in the circuit court wherein such determination is pending in such amount as the judge thereof may prescribe, conditioned that such party will pay all damages that may accrue by reason of such determination not being enforced. Immediately upon the filing and approval of such bond, the clerk of the circuit court shall transmit to the Board of Control a certified copy of such bond, which shall be recorded in the records by such board, and the State Engineer

shall immediately give notice thereof to the superintendent of the proper water division.

Section 30. Rehearing.—Within six months from the date of the decree of the circuit court determining the rights upon any stream, or if appealed within six months from the decision of the supreme court, the Board of Control, or any party interested, may apply to the circuit court for a rehearing upon grounds to be stated in the application. Thereupon, if in the discretion of the court it shall appear that there are good grounds for the rehearing, the circuit court, or judge thereof, shall make an order fixing a time and place when such application shall be heard. The clerk of the circuit court shall, at the expense of the petitioner, forthwith mail written notice of said application to the Board of Control and to every party interested, and state in such notice the time and place when such application will be heard.

Section 31. Authorized to Administer Oaths.—The members of the Board of Control may administer oaths in the performance of their official duties.

Section 32. Fees.—The secretary of the Board of Control shall collect the following fees, which shall be paid in advance, and accounted for to the board, which fees shall be paid into the general fund of the State Treasury by such board at the adjournment of each regular meeting: for making transcripts of the records of the Board of Control or of papers or documents filed with said board, one dollar for the first folio and ten cents for each additional folio. For attaching certificate and seal of the board to each transcript, one dollar.

Section 33. Conclusive, When.—The determinations of the Board of Control as confirmed or modified as provided by this act in proceedings shall be conclusive as to all prior rights, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination.

Section 34. Duty of Water Right Claimants.—When

ever proceedings shall be instituted for the determination of the rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his claim shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him. Any person, association or corporation interested in the water of any stream upon whom or which no service of notice shall have been had of the pendency of proceedings for the determination of the rights to the use of the water of said stream, and who or which shall have no actual knowledge or notice of the pendency of said proceedings may at any time prior to the expiration of one year after the entry of the determination of the board file a petition to intervene in said proceedings. Such petition shall contain, among other things, all matters required by this act, of claimants who have been duly served with notice of said proceedings and also a statement that the intervenor had no actual knowledge or notice of the pendency of said proceedings. Upon the filing of said petition in intervention, the petitioner shall be allowed to intervene upon such terms as may be equitable, and thereafter shall have all rights vouchsafed by this act to claimants who have been duly served.

Section 35. Proof Open to Inspection; Who May Contest.—Whenever the rights to the waters of any stream have been determined as herein provided, and it shall appear by the records of such determination that it had not been at one and the same proceeding, then in such case the Board of Control may open to public inspection, all proofs or evidence of rights to the water, and the findings of the board in relation thereto in the manner provided in Section 18; and any persons, corporations, or associations who may desire to contest the claims or rights of other persons, corpor-

ations, or associations, as set forth in the proofs or established by the board, shall proceed in the manner provided for in Sections 19, 20 and 22; provided, that contests may not be entered into and shall not be maintained except between claimants who were not parties to the same adjudication proceedings in the original hearings.

WATER MASTERS.

Section 36. Districts.—The Board of Control shall divide each water division into water districts, and said water districts to be so constituted as to secure the best protection to the claimants for water and the most economical supervision on the part of the State; said water district shall not be created until a necessity therefor shall arise, but shall be created from time to time as the claims thereof from the streams of the State shall be determined.

Section 37. Water Master; How Appointed.—There shall be appointed by the Board of Control, one water master for each water district, who shall be a resident of the district he is appointed for and who shall have been a resident of said district for one year immediately prior to the date of his appointment, shall be selected from persons recommended by the superintendent of the water division in which such water district is situated. Each water master shall hold his office until his successor is elected and shall have qualified, and the Board of Control shall, by like selection and appointment, fill all vacancies which shall occur in the office of water master.

Section 38. Duty of Water Master.—It shall be the duty of the said water masters to divide the water of the natural streams or other sources of supply of his district among the several ditches and reservoirs, taking water therefrom, according to the rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the headgates of ditches, and shall regulate or cause to be regulated, the controlling works of reservoirs, in time of scarcity of water, as may be necessary by reason of the rights

existing from said streams of his district. The water master shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir, where rights have been determined, in accordance with existing decrees. Whenever, in the pursuance of his duties, the water master regulates a headgate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such headgate or controlling works, a written notice properly dated and signed, setting forth the fact that such headgate or controlling works has been properly regulated and is wholly under his control, and such notice shall be a legal notice to all parties interested in the division and distribution of the water of such ditch or reservoir. It shall be the duty of the district attorney to appear for, or on behalf of the division superintendent or any water master in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of said district attorney.

Section 39. Water Master Shall Prevent Waste.—Said water master shall, as near as may be, divide, regulate and control the use of the water of all streams within his district by such closing or partially closing of the headgates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled, and any person who may be injured by the action of any water master, shall have the right to appeal to the circuit court for an injunction. Such injunction shall only be issued in case it can be shown at the hearing that the water master has failed to carry into effect the order of the board of control or decrees of the court determining the existing rights to the use of water.

Section 40. Pay of.—Each water master herein provided for shall receive compensation at the rate of $5.00 per day for each day he shall be actively employed in the duties of his office. Where the service may be improved by continuous employment and upon recommendation of the division superintendent and the approval of the county court of the county, or counties,

in which said district is located by an order, or orders, made at regular term, or terms, thereof when sitting for the transaction of county business he shall receive pay at the rate of $100.00 per month, in either case to be paid by the county in which the work is performed. Each water master shall keep a true and just account of time spent by him in the duties of each county, respectively, in which his duties may extend, and he shall present a true copy thereof, verified by oath, to the county court sitting for the transaction of county business of the county in which his work may be performed. And the county court shall, upon approval thereof by the superintendent of the water division, allow and pay the same. *Provided,* any water master may be suspended by an order of the county court of any county in which his district may lie in case said court shall find and enter an order to the effect that said water master is claiming more time than the public service requires, and during such suspension such water master shall receive no pay.

Section 41. Employment of Assistants.—Said water master shall have power, in cases of emergency, to employ suitable assistants to aid him in the discharge of his duties. Such assistants shall take the same oath as the water master, and shall obey his instructions, and each shall be entitled to such compensation as his services may demand and as the superintendent may recommend, not to exceed in any case, four dollars per day for each day he is employed, such payments to be made upon certificates of the division superintendent in the same manner as provided for the payment of the water master. The term of service of such assistant water master may be terminated at any time by the division superintendent, and shall in no event continue after the emergency has ceased to exist.

Section 42. Water Masters to Begin Work, When.—When arrangements are not made for employment of a water master at a monthly rate, as provided in Section 40 of this act, the said water master shall begin his work upon written demand being made upon

him therefor by one or more water users. Such written demand for his services shall be attached to his bill for services and forwarded with it to the county commissioners of the proper county. Where the said water master is employed by the month he shall begin work and terminate his services as the superintendent of his water division may direct. The division superintendent may, under any condition, call upon the water master for work within his district whenever the necessity therefor may in his judgment arise.

Section 43. Interference With Headgate; Penalty.—Any person who shall willfully open, close, change or interfere with any lawfully established headgate or water box without authority, or who shall willfully use water or conduct water into or through his ditch which has been lawfully denied him by the water master or other competent authority, shall be deemed guilty of a misdemeanor. The possession or use of water when the same shall have been lawfully denied by the water master or other competent authority shall be *prima facie* evidence of the guilt of the person using it.

Section 44. Power of Arrest.—The water master, or his assistants, within his district shall have power to arrest any person or persons violating any of the provisions of this act and turn them over to the sheriff or other competent police officer within the county; and immediately upon delivering any such person so arrested into the custody of the sheriff, it shall be the duty of the water master making such arrest to immediately, in writing and upon oath, make complaint before the proper justice of the peace against the person so arrested.

PROCEDURE RELATIVE TO THE APPROPRIATION OF WATER.

Section 45. Application.—Any person, association or corporation hereafter intending to acquire the right to the beneficial use of any waters shall, before commencing the construction, enlargement or extension of any ditch, canal or other distributing or controlling

works, or performing any work in connection with said construction, or proposed appropriation, make an application to the State Engineer for a permit to make such appropriation. Any person who shall willfully divert or use water to the detriment of others without compliance with law, shall be deemed guilty of a misdemeanor. The possession or use of water, except when a right of use is acquired in accordance with law, shall be *prima facie* evidence of the guilt of the person using it.

Section 46. Applications, Nature of.—Each application for permit to appropriate water shall set forth the name and postoffice address of the applicant, the source of water supply, the nature and amount of the proposed use, the location and description of the proposed ditch, canal, or other work, the time within which it is proposed to begin construction, the time required for completion of the construction, and the time for the complete application of the water to the proposed use. If for agricultural purposes, it shall give the legal subdivisions of the land and the acreage to be irrigated, as near as may be. If for power purposes, it shall give the nature of the works by means of which the power it to be developed, the head and amount of water to be utilized, and the uses to which the power is to be applied. If for the construction of a reservoir, it shall give the height of dam, the capacity of the reservoir, and the uses to be made of the impounded waters. If for municipal water supply, it shall give the present population to be served, and, as near as may be, the future requirements of the city. If for mining purposes, it shall give the nature of the mines to be served, the methods of supplying and utilizing the water. All applications shall be accompanied by such maps and drawings, in duplicate, and such other data as may hereafter be prescribed by the Board of Control, and such accompanying data shall be considered as a part of the application.

Section 47. Applications, Approval of.—Upon receipt of an application, it shall be the duty of the State

Engineer to make an indorsement thereon of the date of its receipt and to keep a record of the same. If upon examination the application is found to be defective, it shall be returned for correction or completion, and the date of, and reasons for the return thereof, shall be indorsed thereon and made a record in his office. No application shall lose its priority of filing on account of such defects, provided acceptable maps and drawings are filed in the office of the State Engineer within thirty days from the date of said return to the applicant. All applications which shall comply with the provisions of this act shall be recorded in a suitable book kept for that purpose, and it shall be the duty of the State Engineer to approve all applications made in proper form which contemplate the application of water to a beneficial use, but when the proposed use conflicts with determined rights, or is a menace to the safety and welfare of the public, the application shall be referred to the Board of Control for consideration. It shall be the duty of the board to enter an order directing the refusal of such application, if, after full hearing, the public interest demands. An application may be approved for a less amount of water than that applied for, if there exists substantial reasons therefor, and in any event shall not be approved for more water than can be applied to a beneficial use. Applications for muncipal water supplies may be approved to the exclusion of all subsequent appropriations, if the exigencies of the case demand upon consideration and order by the Board of Control.

Section 48. Application, How Indorsed.—The approval or rejection of an application shall be indorsed thereon and a record made of such indorsement in the State Engineer's office. The application so indorsed shall be returned immediately to the applicant by mail. If approved, the applicant shall be authorized, on receipt thereof, to proceed with the construction of the necessary works, and to take all steps required to apply the water to a beneficial use, and to perfect the proposed appropriation. If the application is refused, the applicant shall take no steps toward the construction

of the proposed work or the diversion and use of water so long as such refusal shall continue in force.

Section 49. Assignment of Permit.—Any permit or license to appropriate water may be assigned, subject to the conditions of the permit, but no such assignment shall be binding, except upon the parties thereto, unless filed for record in the office of the State Engineer.

Section 50. Limitation on Time of Completing Work. —Actual construction work shall begin within one year from the date of approval of the application and the construction of any proposed irrigation or other work shall thereafter be prosecuted with reasonable diligence, and be completed within a reasonable time, as fixed in the permit, not to exceed five years from the date of such approval. The Board of Control shall, for good cause shown, extend the time within which irrigation or other works shall be completed, or the right perfected, under any permit which may be submitted for its consideration by the State Engineer.

Section 51. Appeals.—Any applicant may appeal to the Board of Control for relief, which board may modify the decisions of the State Engineer if it shall appear that he has abused the authority reposed in him by law. Such appeal shall be taken within 30 days from the date of such decision by the State Engineer, and shall be perfected when the applicant shall have filed in the office of the board a copy of the order appealed from, together with a petition setting forth the appellant's reason for appeal, and such appeal shall be heard and determined upon such competent proof as shall be adduced by the applicant, and such like proofs as shall be adduced by the State Engineer. The State Engineer shall not sit as a member of the board on such appeal.

Section 52. Fees.—The following fees shall be collected by the State Engineer in advance, and be paid by him into the general fund of the State Treasury on the last day of March, June, September and December of each year:

(a) For examining an applicant for permit to appropriate water, three dollars.

(b) For filing and recording permit to appropriate water for irrigation purposes, fifteen cents per acre for each acre to be irrigated up to and including one hundred acres, and five cents per acre for each acre in excess of one hundred and up to and including one thousand acres; and one cent per acre for each acre in excess of one thousand acres, or in case the application is for power purposes, twenty-five cents for each theoretical horsepower to be developed up to and including one hundred, and ten cents for each horsepower in excess of one hundred and up to and including one thousand, and five cents for each horsepower in excess of one thousand; or, in case the application is for any other purpose, including applications by municipalities for power purposes, five dollars for filing and recording each permit.

(c) For filing or recording any other water right instrument, one dollar for the first hundred words and ten cents for each additional hundred words or fraction thereof.

(d) For making copy of any document recorded or filed in his office, ten cents for each hundred words or fraction thereof; but where the amount exceeds $5.00, then only the actual cost in excess of that amount shall be charged.

(e) For certifying to copies, documents, records, or maps, one dollar for each certificate.

(f) For blue print copy of any map or drawing, ten cents per square foot or fraction thereof. For such other work as may be required of his office, actual cost of the work.

Section 53. Water Right Certificate.—Upon it being made to appear to the satisfaction of the Board of Control that any appropriation has been perfected in accordance with the provisions of this act, it shall be the duty of the Board of Control to issue to the applicant a certificate of the same character as that described in Section 25. Said certificate shall be recorded and transmitted to the applicant as provided in said section.

Certificates issued for rights to the use of water for power development acquired under the provisions of this act shall limit the right or franchise to a period of forty years from date of application, subject to a preference right of renewal under the laws existing at the date of expiration of such franchise or right.

Section 54. Date of Right.—The right acquired by such appropriation shall date from the filing of the application in the office of the State Engineer.

Section 55. Headgate, Maintenance of.—The owner or owners of any ditch or canal shall maintain, to the satisfaction of the division superintendent of the division in which the irrigation works are located, a substantial headgate at the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by the water master; and such owners shall construct and maintain when required by the division superintendent, suitable measuring devices at such points along such ditch as may be necessary for the purpose of assisting the water master in determining the amount of water that is to be diverted into said ditch from the stream, or taken from it by the various users. Any and every owner or manager of a reservoir, located across or upon the bed of a natural stream, shall be required to construct and maintain, when required by the division superintendent, a measuring device of a plan to be approved by the State Engineer, below such reservoir, and a measuring device above such reservoir on each or every stream or source of supply discharging into such reservoir, for the purpose of assisting the water master or superintendent in determining the amount of water to which appropriators are entitled and thereafter diverting it for such appropriators' use. When it may be necessary for the protection of other water users, the division superintendent may require flumes to be installed along the line of any ditch. If any such owner or owners of irrigation works shall refuse or neglect to construct and put in such headgates, flumes or measuring devices after ten days' notice, the division superintendent may

close such ditch, and the same shall not be opened or any water diverted from the source of supply, under the penalties prescribed by law for the opening of headgates lawfully closed, until the requirements of the division superintendent as to such headgate, flumes or measuring device have been complied with, and if any owner or manager of a reservoir located across the bed of a natural stream shall neglect or refuse to put in such measuring device after ten days' notice by the division superintendent, such superintendent may open the sluice gate or outlet of such reservoir and the same shall not be closed under penalties of the law for changing or interfering with headgates, until the requirements of the division superintendent as to such measuring devices are complied with.

Section 56. Engineer's Authority to Inspect.—The State Engineer shall have authority to examine and inspect, during construction, any dam, authorized under the provision of this chapter, or any ditch, canal or other work, and at the time of such inspection, or thereafter, he shall notify the parties constructing such dam, or other works, of any addition or alteration which he considers necessary for the security of the work or the safety of any person or persons residing on or owning land in the vicinity of such works, or for the safety of their property.

Section 57. Inspection; When Required.—Should any person or persons residing on or owning land in the neighborhood of any irrigation works after completion, or in course of construction, apply to the State Engineer in writing desiring an inspection of such works, the State Engineer may order an inspection thereof. Before doing so he may require the applicant for such inspection to make a deposit of a sum of money sufficient to pay the expenses of an inspection, and in case the application appears to him not to have been justified, he may cause the whole or part of such expenses to be paid out of such deposit. In case the application appears to the State Engineer to have been justified, he may require the owner of the works to pay the

whole or any part of the expenses of the inspection, and the same shall constitute a valid lien against the works, which may be enforced in the same manner as provided for the enforcement of mechanics' liens.

RESERVOIRS.

Section 58. Procedure Under Reservoir Permit.—All applications for reservoir permits shall be subject to the provisions of Sections 45 to 51, both inclusive, except that an enumeration of any lands proposed to be irrigated under this act shall not be required in the primary permit. But the party or parties proposing to apply to a beneficial use the water stored in any such reservoir shall file an application for permit, to be known herein as the secondary permit, in compliance with the provisions of Sections 45 to 51, both inclusive. Said application shall refer to such reservoir for a supply of water and shall show by documentary evidence that an agreement has been entered into with the owners of the reservoir for a permanent and sufficient interest in said reservoir to impound enough water for the purposes set forth in said application. When beneficial use has been completed and perfected under the secondary permit, the division superintendent shall take the proof of the water user under such permit and the final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit.

Section 59. Duty of Water Master and Costs; How Payable.—Whenever the owner, manager or lessee of a reservoir, constructed under the provisions of this act shall desire to use the bed of a stream, or other water-course, for the purpose of carrying stored or impounded water from the reservoir to the consumer thereof, he shall, in writing, notify the water master of the district, in which the stored or impounded water is to be used, giving the date when it is proposed to discharge water from such reservoir, its volume, and the names of all persons and ditches entitled to its use. It shall then be the duty of such water master to close, or so adjust the headgates of all ditches from the

stream or watercourse, not entitled to the use of such stored water, as will enable those having the right to secure the volume to which they are entitled. The water master shall keep a true and just account of the time spent by him in the discharge of his duties as defined in this section, and it shall be the duty of the county commissioners of the county wherein the expense is incurred, to present a bill of one-half the expense so incurred to the reservoir owner, manager or lessee, and if such owner, manager or lessee shall neglect for thirty days, after the presentation of such bill of costs, to pay the same, the said costs shall be made a charge upon said reservoir and shall be collected as delinquent taxes until the complete payment of such bill of costs has been made.

Section 60. Attorney-General and District Attorneys Advisors of State Engineer.—The Attorney-General and the district or prosecuting attorney of the county in which legal questions arise, shall be the legal advisors of the State Engineer and of the Board of Control, and shall perform any and all legal duties necessary in connection with their work, without other compensation than their salaries as fixed by law.

Section 61. Joint Owners; Responsibility.—In all cases where ditches are owned by two or more persons and one or more of such persons shall fail or neglect to do a proportionate share of the work necessary for the proper maintenance and operation of such ditch or ditches or to construct suitable headgates or measuring devices at the points where water is diverted from the main ditch, such owner or owners desiring the performance of such work may, after having given ten days' written notice to such other owner or owners, who have failed to perform such proportionate share of the work, necessary for the operation and maintenance of said ditch or ditches, perform such share of the work, and recover therefor from such person or persons in default the reasonable expense of such work.

Section 62. Lien for Work Performed on Ditch.—Upon the failure of any co-owner to pay his propor-

tionate share of such expense, as mentioned in the preceding section, within thirty days after receiving a statement of the same as performed by his co-owner or owners, such person or persons so performing such labor may secure payment of said claim by filing an itemized and sworn statement thereof, setting forth the date of the performance and the nature of the labor so performed, with the county clerk of the county wherein said ditch is situated, and when so filed it shall constitute a valid lien against the interest of such person or persons in default, which said lien may be established and enforced in the same manner as provided by law for the enforcement of mechanics' liens.

Section 63, Regulation of Partnership Ditches and Reservoirs.—When two or more persons, joint owners in an irrigation ditch or reservoir, not incorporated, or their lessees, are unable to agree relative to the division or distribution of water received through their ditch or from their reservoir, it shall be lawful for any such owner or owners, his or their lessee or lessees, or either of them, to apply to the water master of the district in which such ditch or reservoir shall be located, by a written notice setting forth such fact, asking the water master to take charge of such ditch or reservoir for the purpose of making a just division or distribution of the water from the same, to the parties entitled to the use thereof. The said water master shall take exclusive charge of such ditch or reservoir for the purpose of dividing the water therefrom in accordance with established rights, and continuing the said work until the necessity therefor shall cease to exist. In all cases where the water master or an assistant water master is called upon to divide the waters of a ditch or reservoir between appropriators, he shall be paid in full for his services by the interested water users in proportion to the established rights of each, and shall have a lien upon any land irrigated by the water owned by an interested water user refusing to pay, said lien to be established and enforced in the same manner as a mechanics' lien.

Section 64. Injunctions.—In suits for injunction

affecting the use of water from streams upon which the rights to water have been determined, no restraining order shall be granted before hearing had after at least three days' notice thereof, served upon all persons defendant. All suits for injunction involving the use of water shall be heard, either in term time or during vacation, not later than fifteen days after issues joined, unless for good cause shown further time be allowed.

Section 65. Water Appurtenant to Land for Irrigation Purposes.—All water used in this State for irrigation purposes shall remain appurtenant to the land upon which it is used; *provided*, that if for any reason it should at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the water is appurtenant, said right may be severed from said land; and simultaneously transferred, and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights, on the approval of an application of the owner to the Board of Control. Before the approval of such transfer an inspection shall be made by the proper division superintendent, who shall submit his report to the Board of Control, whereupon, by order, the board shall approve or disapprove such transfer and prescribe the conditions therefor. Such order shall be subject to appeal as in this act provided.

Section 66. Unlawful Use of Water and Waste.—The unauthorized use of water to which another person is entitled, or the willful waste of water to the detriment of another, shall be a misdemeanor, and the possession or use of such water without legal right, shall be *prima facie* evidence of the guilt of the person using it. It shall also be a misdemeanor to use, store, or divert any water until after the issuance of permit to appropriate such waters.

Section 67. Obstructing Works.—Whenever any appropriator of water has the lawful right of way for the storage, diversion, or carriage of water, it shall

be unlawful to place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto. Any violation of the provisions of this section shall be a misdemeanor.

Section 68. Penalty for Misdemeanors Under This Act.—All violations of the provisions of this act, declared herein to be misdemeanor, shall be punished by a fine not exceeding two hundred and fifty dollars nor less than ten dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Section 69. Appropriations.—There is hereby appropriated out of any moneys in the general fund of the State Treasury not otherwise appropriated the sum of $10,000 annually, or so much thereof as may be necessary for the payment of the salaries and expenses incurred by the Board of Control under the provisions of this act.

There is hereby appropriated out of any moneys in the general fund of the State Treasury not otherwise appropriated the sum of $5,000 annually, or so much thereof as may be necessary for the salary and expenses of the State Engineer, and the services of assistants, and expenses of the office and department of the State Engineer, which appropriation is in addition to the $5,000 annual appropriation heretofore made in Chapter 228, Session Laws of 1905.

All salaries and expenses incurred, and material and supplies furnished under the provisions of this act shall be paid at the same time and in the same manner as those of other officers of the State.

Section 70. Vested Rights Preserved.—

1. Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.

2. Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to

the extent of the actual application to beneficial use; provided, such use has not been abandoned for a continuous period of two years.

3. And where any riparian proprietor, or under authority of any riparian proprietor or his or its predecessor in interest, any person or corporation shall, at the time this act is filed in the office of the Secretary of State, be engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use such water shall be deemed vested in such riparian proprietor; provided, such works shall be completed and said water devoted to a beneficial use within a reasonable time after the passage of this act. The Board of Control, in the manner hereinafter provided, shall have power and authority to determine the time within which such water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the Board of Control.

4. Nor shall anything in this act contained affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined or pending prior to the taking effect of this act.

5. Nor shall the right of any person, association or corporation, to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated prior to the filing of this act in the office of the Secretary of State, and such appropriators, their heirs, successors or assigns, shall, in good faith and in compliance with laws existing at the time of filing this act in the office of the Secretary of State, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecute such work diligently and continuously to completion, but all such rights shall be adjudicated in the manner provided in this act.

6. The Board of Control shall have authority, and shall for good cause, shown upon the application of

any appropriator, or user of water under an appropriation of water made prior to the passage of this act, or in the cases mentioned in subdivisions 3 and 5 of this section, where actual construction work has been commenced prior to said time or within the time provided in law existing at the time of filing this act in the office of the Secretary of State, to prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use, and in determining said time shall grant a reasonable time after the construction of the works, or canal, or ditch, used for the diversion of the water, and in doing so shall take into consideration the cost of the appropriation and application of such water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. Upon making such order the Board of Control shall direct the State Engineer to issue a certificate showing such determination. For good cause shown the Board of Control may extend the time by granting further certificates.

7. And where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction of improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof.

8. All rights granted or declared by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act. This act shall not be held to bestow upon any person, association, or corporation, any riparian rights where no such rights existed prior to the time this act takes effect.

Section 71. Portland Water Supply.—The exclusive right to the use of the waters of Bull Run and Little Sandy rivers is hereby granted to the city of Portland,

and all rights to the waters of the lakes, rivers and streams of this State heretofore acquired for the purposes of municipal water supply are hereby confirmed, and no rights which shall be acquired under this act shall impair the rights of any municipal corporation to waters heretofore taken. The Board of Control shall reject, or grant subject to municipal use, all applications where, in its judgment, the appropriation of the waters applied for impair a municipal water supply. It shall be the duty of municipal corporations of the State, on request of the State Engineer, to furnish to him a statement of the amount and source of the municipal water supply, with probable increase or extension of the same; provided, that this act shall not be deemed or held to and shall not impair the rights of any person, association or corporation who may, at and prior to the time this act is filed in the office of the Secretary of State, have any vested right to or valid appropriation or bona fide notice of appropriation of the waters of either the Bull Run or the Little Sandy river, under laws heretofore in effect or under any valid contract or deed of conveyance heretofore made with or by the city of Portland.

Section 72. Eminent Domain.—The United States, the State, or any person, foreign or domestic corporation or association, may exercise the right of eminent domain to acquire for a public use any property or rights now or hereafter existing when found necessary for the application of water to beneficial uses, including the right to enlarge existing structures and use the same in common with the former owner. Any right of way so acquired shall be so located as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such property or rights may be acquired in the manner provided by law for the taking of private property for public use.

The right to conduct water from or over the land of another for any public use, including the right to raise any water by means of dams, reservoirs or embankments to a sufficient height to make the same

available for the use intended; and the right to any and all land necessary therefor, may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use.

Section 73. Repeal.—All laws and parts of laws so far as in conflict or inconsistent with the provisions of this act are hereby repealed.

Section 74. Emergency.—WHEREAS, there is great uncertainty existing throughout the State with reference to the water rights of various parties along the streams, ditches and waterways as to their several interests therein, entailing expensive litigation and engendering many animosities and much bad blood, thereby endangering the public peace and safety of many sections of the State, and WHEREAS, it is urgent that these conditions be remedied for the preservation of the public peace, health and safety of the State, this act shall be in full force and effect from and after its approval by the Governor.

Filed in the office of the Secretary of State February 24, 1909.

POLICE POWER—EMERGENCY CLAUSE

The Emergency Clause attached to the foregoing Water Code of 1909, Section 74, thereof, is cited in the majority opinion (R. 444; 73 Fed. 2d 567) as establishing that said Water Code purported to be exercise of the police power of the State. The language of the Opinion is:

> "The Oregon Code of 1909 itself purported to be an exercise of the police power of the State, as shown by Section 74. Emergency."

At the time of the passage of the Act, the emergency clause was used to prevent laws being referred to the people under what the Oregon Constitution calls the

"Referendum." That was practically the sole use of the emergency clause of the Act, set forth in the majority opinion.

In fact Colorado, Arizona, Ohio, and other states which borrowed from Oregon their referendum provisions of their constitutions, followed the doctrine of the Supreme Court of Oregon as announced in the *Kadderly* case, cited below.

OREGON REFERENDUM AMENDMENT

The initiative and referendum amendment to the Oregon Constitution is an amendment of Article IV and follows: (June 2nd, 1902).

Oregon Code Annotated, official edition 1930, Volume 1, page 96.

"ARTICLE IV.

LEGISLATIVE DEPARTMENT.

§ 1. Legislative authority—Style of bill—Initiative and referendum. The legislative authority of the state shall be vested in a legislative assembly consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. *The*

second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded * * *."

tion 28 of Article IV of the Oregon Constitution, said Volume I, Oregon Code, page 120, reads:

"§ 28. When act to take effect.—No act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of emergency; which emergency shall be declared in the preamble or in the body of the law."

THE KADDERLY CASE

The use of the emergency clause is not a legislative declaration that the act is the exercise of the state police power.

The following quotations from the Kadderly case, and those citing it follow.

Kadderly v. Portland, 44 Or. 118 (*Dec.* 1903), (74 Pac. 710, 75 Pac. 222).

Quotation from Point 10, pages 146 to 151, inclusive, of the Oregon Report:

"10. This brings us to the question as to whether the legislative declaration that the Portland charter was necessary for the preservation of the public peace, health, and safety is conclusive on the courts. Under the initiative and referendum

amendment, laws 'necessary for the immediate preservation of the public peace, health, or safety' are excepted from its operation. *As to them, the action of the legislative and executive departments is conclusive and final, so far as their enactment is concerned. No power is reserved to the people to approve or disapprove them.* They are not subject to the referendum amendment, and as to them the powers of the other departments of the government derived from the constitution are unaffected. The legislative assembly may, in its discretion, put them into operation through an emergency clause, as provided in the Constitution of Oregon, Article IV, § 28, or it may allow them to become laws without an emergency clause, the necessity or expediency of either course being a matter for its exclusive determination. As to all other laws the amendment applies, and they cannot be made to go into operation for 90 days after the adjournment of the session at which they were adopted, or until after approval by the people if the referendum is invoked. The Constitution of Oregon, Article IV, § 28, giving the legislative assembly power to put any law into force upon approval by declaring an emergency, has been modified by the amendment of 1902, so as to exclude from the power to declare an emergency all laws except those necessary for the immediate preservation of the public peace, health, or safety. So far, all are agreed. But the vital question is, what tribunal is to determine whether a law does or does not fall under this classification? Are the judgment and findings of the legislative assembly conclusive, or are they subject to review by the courts? *The inquiry is much simplified by bearing in mind that the exception in the constitutional amendment is not confined to such laws as the legislative assembly may legally enact by virtue of the police powers of the State, or to those alone that may affect the public peace, health, or safety. The police power is limited to the imposition of*

restraints and burdens on persons and property, in order to secure the general comfort, health, and prosperity of the state: Tiedeman, Lim. Pol. Power, § 1. *But the language of the constitutional amendment is broader, and includes all laws, of whatsoever kind, necessary for the immediate preservation of the public peace, health, or safety, whether they impose restraints on persons and property, or come strictly within the police powers, or not.* The laws excepted from the operation of the amendment do not depend alone *upon their character,* but upon the necessity for their enactment in order to accomplish certain purposes. *As to such laws the amendment of* 1902 *does not in any way abridge or restrict the power of the legislature, which, by the insertion of a proper emergency clause, may unquestionably cause them to go into effect upon approval by the Governor.* As the legislature may exercise this power when a measure is in fact necessary for the purposes stated, and as the amendment does not declare *what shall be deemed laws of the characted indicated,* who is to decide whether a specific act may or may not be necessary for the purpose? Most unquestionably, those who make the laws are required, in the process of their enactment, to pass upon all questions of expediency and necessity connected therewith, and must therefore determine whether a given law is necessary for the preservation of the public peace, health, and safety.

It has always been the rule, and is now everywhere understood, that the judgment of the legislative and executive departments as to the wisdom, expediency, or necessity of any given law is conclusive on the courts, and cannot be reviewed or called in question by them. *It is the duty of the courts, after a law has been enacted, to determine in a proper proceeding whether it conflicts with the fundamental law, and to construe and interpret it so as to ascertain the rights of the parties litigant. The powers of the courts do not extend to*

the mere question of expediency, or *necessity,* but, as said by Mr. Justice Brewer, 'they are wrought out and fought out in the legislature and before the people. Here the single question is one of power. We make no laws. We change no constitutions. We inaugurate no policy. When the legislature enacts a law, the only question which we can decide is whether the limitations of the constitution have been infringed upon': Prohibitory Am. Cas. 24 Kan. 700, 706. The amendment excepts such laws as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The constitution does not confer it upon any tribunal. It must therefore necessarily reside with that department of the government which is called upon to exercise the power. It is a question of which the legislature alone must be the judge, and when it decides the fact to exist, its action is final: *Biggs v. McBride,* 17 Or. 640 (21 Pac. 878, 5 L. R. A. 115); *Umatilla Irrig. Co. v. Barnhart,* 22 Or. 389 (30 Pac. 37); *Gentile v. State,* 29 Ind. 409; *Wheeler v. Chubbuck,* 16 Ill. 361; *Sutherland,* Stat. Const. 108."

Cameron v. Stevens, 121 *Or.* 538 (1927), 256 Pac. 395.

Quotation from Oregon Report, 544-5:

"5-8. The effect of an emergency clause upon acts passed by the legislature is to cause the act to take effect at once upon its approval by the Governor and to *prevent its not going into effect* until after the expiration of the period otherwise prescribed by the Constitution. *What* may be deemed an emergency for this purpose is purely a legislative question. The courts will not inquire into it, nor entertain any question of its sufficiency: 1 *Lewis' Sutherland on Statutory Const.* (2 ed.), § 176. Hence, it would *seem to follow that unless expressly prohibited by some constitutional provi-*

sion, the legislature has as much power to prescribe when an act shall take effect as it has to enact the law itself, and that in order to make it take effect at once, it has the power to declare an emergency, and when so declared the act is not subject to the referendum powers of the people."

COLORADO

Shields et al v. City of Loveland et al, 74 Colo. 27, (July 2, 1923), 218 Pac. 913.

Quotation from the Pacific Reporter reference, page 915:

"*Article 5 of our Constitution is borrowed from Oregon almost literally,* and at the time of its adoption the Oregon courts had already held on this point in favor of the defendants in error, *Kadderly v. Portland,* 44 Or. 118, 74 Pac. 710, 75 Pac. 222, and later in *Thielke v. Albee,* 79 Or. 48, 153 Pac. 793, and so we held. See *Van Kleeck v. Ramer,* 62 Colo. 4, 156 Pac. 1108; *People v. Ramer,* 61 Colo. 422, 158 Pac. 146; *In re Senate Resolution,* 54 Colo. 262, 130 Pac. 333. So. Ohio, *Shyrock v. Zanesville,* 92 Ohio St. 375, 110 N. E. 937."

In re Senate Resolution Number 4, Supreme Court of Colorado, (Feb. 28, 1913), 54 Colo. 262, 130 Pac. 333.

Quotation from Pacific Reporter reference, page 336, Point 3:

"(3) The next question is, Can the General Assembly lawfully prevent the proposed act from being *referred* by the declaration contained in section 6 thereof? To answer this, reference must again be had to the constitutional provision under consideration. It provides that the power reserved designated the 'Referendum' 'may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety.' Whether a law is of this character is for the General Assembly to determine, and, when it so determines, by a declaration to that effect in the

body of a proposed act, we are of the opinion that *such declaration is conclusive upon all departments* of government, and all parties, in so far *as it abridges the right, to invoke* the referendum. Such a declaration is a part of the act, and may be passed by the majority required to pass any act, and is in no sense an emergency clause, as contemplated by Article 5, § 19."

To the same effect is

Van Kleeck v: Ramer, 62 Colo. 4, 156 Pac. 1108 (Apr. 3, 1916).

ARIZONA

Arizona has a similar referendum amendment, similarly construed. In its Supreme Court in defining the office of the emergency clause, with reference to its referendum, it cited with approval and followed the Oregon case of Kadderly vs. Portland, in

Orme v. Salt River Water Users' Association, 25 Ariz. 324, 217 Pac. 935 (1923).

OHIO

Ohio took its referendum provision from the Oregon Constitution, as stated in

State ex rel. Durbin v. Smith, 102 Ohio State, 591, 133 N. E. Rep. 457 (June 16, 1921).

It cited with approval and followed the Kadderly case, supra.

OREGON LEGISLATIVE RECOGNITION OF RIPARIAN RIGHTS ARISING FROM THE LOCATION OF RIPARIAN LANDS ALONG THE STREAMS.

LAWS OF OREGON, 1891,

Page 52. Act approved February 18th, 1891.

An Act entitled: "An Act to provide for the appro-

piation of water from the lakes and running streams of the State of Oregon" * * * * * "*allowing the condemnation of rights of riparian proprietors arising from their locations;*" * * * *.

"Sec. 8. Such corporation may also *maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location.* Such actions shall be brought in the county where the lands to be affected or some portion thereof are situated, and the manner of procedure therein shall be similar to that prescribed in the preceding section for condemnation of lands; *but no person owning lands lying contiguous to any stream shall, without his consent, be deprived of water for household or domestic use,* or for the purpose of watering his stock, or *of water necessary to* irrigate *crops growing upon such lands, and actually used therefor.*"

OREGON LAWS, 1895,

Page 13. Approved February 20, 1895.

An Act entitled: "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes."

Section 45 provides for a rotation system between users when the water is insufficient to fully supply the needs of all.

"Sec. 48. None of the provisions of this Act shall be construed as repealing or in anywise modifying the provisions of any Act relating to the subject of

irrigation or water commissioners. *Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal or ditch from its channel, to the detriment of any person or persons having any interest in such river, creek, stream, canal or ditch or the waters therein, unless previous compensation be ascertained and paid therefor,* under the laws of this state, authorizing the taking of private property for public uses."

OREGON LAWS OF 1899,

Page 172. Act approved February 18th, 1899.

(B. & C. Comp. 5022 et seq.)

An Act entitled: "To provide for the appropriation of water from the lakes and running streams of the State of Oregon for the purpose of developing the mineral resources of the state and for other purposes," * * * * * "allowing the condemnation of rights of riparian proprietors arising from their location; * * *."

"Section 9. Such persons, companies and corporations may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location. Such action shall be brought in the county where the . ." (The section is incomplete due to some error in its passage).

The foregoing Section 9 of the Act of February 18th, 1899, was amended in the Special Legislative Session of 1903. In the meantime it had been codified in the C. B. Bellinger and W. W. Cotton "Annotated Codes

and Statutes of Oregon," Volume 2, and as Section 5030 thereof.

The amendment follows:

LAWS OF 1903, SPECIAL SESSION
Page 25. Filed with the Secretary of State,
December 24, 1903.

Entitled: "An Act To Amend Section 5030 of the Laws of Oregon as compiled and annotated by C. B. Bellinger and W. W. Cotton."

As amended:

> "Sec. 5030. Such persons, companies and corporations may also maintain an action *for the condemnation and appropriation of the right to the flow of water in any stream from which it or they propose to divert water below the point of diversion vested in the owners of lands* LYING CONTIGUOUS TO SUCH STREAM BY VIRTUE OF THEIR LOCATION." * * * *

In January, 1905, the Supreme Court of Oregon considered the power of eminent domain clause in this Act, and said:

> "It would seem, however, as authority had been granted to condemn land for a ditch, and also power conferred to condemn the right to have the water of a stream flow in the channel thereof below the point of diversion, *the legislative assembly had not intended to deprive or even abridge the rights of a riparian proprietor.*"

It then added:

> "Condemnation proceedings are purely statutory, and every condition prerequisite to an exercise of the right must be strictly pursued."
> *Grande Ronde Electric Co. v. Drake,* 46 Or. at page 248. (78 Pac. 1031).

OREGON LAWS OF 1901,

Page 136. Act of February 25th, 1901.

An Act entitled: "An Act to amend Section 8 of an Act entitled 'An Act to provide for the appropriation of water from lakes and running streams of the State of Oregon" * * * *; "allowing the condemnation of lands for right of way; prescribing the manner of making appropriations and effecting condemnation of lands; *allowing the condemnation of rights of riparian proprietors arising from their location;* * * * * *."

> "§ 8. Such corporation may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of *lands lying contiguous to such stream by virtue of their location.* * * * * *."

OREGON LAWS OF 1905,

Chapter 45, Page 106. Approved February 9, 1905. Oregon Code 1930, § 37-302.

An Act entitled: "An Act to provide for the condemnation of real property, water, water courses, and water and riparian rights by the State of Oregon for public use, for the manner of determining the necessity therefor, and the manner of procedure and making payment therefor."

Section 1. This section provides that whenever it is necessary for the state to acquire any real property, water, water courses, and water and riparian rights, or any interest therein, it may bring, as provided

therein, suit to condemn the same, and for assessment of damages.

This act is still in full force and effect, and it is to be found as above stated in Section 37-302, Oregon Code 1930.

ON ADMISSION, STATE MAY ADOPT OR REJECT COMMON LAW RIPARIAN DOCTRINE

When a state is admitted into the Union, it may determine for itself whether or not it will adopt the common-law doctrine of riparian rights.

Kansas v. Colorado, 206 U. S., pages 46-118, 27 Sup. Ct. 655, 51 L. Ed. 956.

We quote from 206 U. S. at 94-5, as follows:

"It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the *arid regions of the West* of the appropriation of waters for the *purposes of irrigation shall control.* Congress cannot enforce either rule upon any state. It is undoubtedly true that the early settlers brought to this country the common law of England, and that that common law throws light on the meaning and scope of the Constitution of the United States, and is also in many states expressly recognized as of controlling force in the absence of express statute. As said by Mr. Justice Grey in *United States v. Wong Kim Ark,* 169 U. S. 649, 654, 42 L. Ed. 890, 893, 18 Sup. Ct. Rep. 456, 459:

'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familarly known to the framers of the Constitution. *Minor v. Happersett,* 21 Wall. 162, 22 L. Ed. 627; *Ex parte Wilson,* 114 U. S. 417, 422, 29

L. Ed. 89, 91, 5 Sup. Ct. Rep. 935; *Boyd v. United States,* 116 U. S. 616, 624, 625, 29 L. Ed. 746, 748, 749, 6 Sup. Ct. Rep. 524; *Smith v. Alabama,* 124 U. S. 465, 31 L. Ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. The language of the Constitution, as has been well said, could not be understood without reference to the common law. I Kent. Com. 336; Bradley, J.; in *Moore v. United States,* 91 U. S. 270, 274, 23 L. Ed. 346, 347."

THE COMMON LAW ADOPTED ON ADMISSION OF OREGON

Speaking of common law in Oregon, Mr. Justice Gray in

Shively v. Bowlby, 152 U. S. 1, 52 (38 L. Ed. 331, 350), 152 U. S. at 52,

said:

"The settlers of Oregon, like the colonists of the Atlantic States, coming from a country in which the common law prevailed to one that had no organized government, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefore, is based on the common law."

See also:

United States F. & G. Co. v. Bramwell, 108 Or., pages 261-289. *July* 10, 1923 (217 Pac. 332).

Quotation from pages 264-266:

"The common law of England, modified and amended by English statutes, as it existed at the time of the American Revolution, as far as it was general and not local in its nature and applicable to the conditions of the people and not incompatible with the nature of our political institutions or

in conflict with the Constitution and laws of the United States or of this State, except as modified, changed or repealed by our own statutes, has been adopted and is in force in this state: *Perry v. Fletcher,* 93 Or. 43 (182 Pac. 143).

By Section 2, Article 1 of the Organic Law of the provisional government of Oregon, adopted by the vote of the people on July 26, 1845, it was declared that:

> 'The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings, according to the course of common law.' * * * * *

"Section 7, Article XVIII of the Constitution, adopted by the people on September 18, 1857, provides that 'All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until *altered or repealed'.*".

In

Fidelity, etc., Co. v. State Bank of Portland, 117 Or. 1, 5. *January* 19, 1926, (242 Pac. 823),

Quotation from page 5:

> *"It is our understanding that we are as much bound by the applicable rules of the common law, where such rules have not been modified, or abrogated by statute, as we are by the statutes themselves."*

OREGON CASES DECIDED PRIOR TO THE ISSUANCE OF PETITIONER'S PATENT:

Petitioner's Patent was Issued April 20, 1885,

Defendants' Exhibit W, (R. 301-3).

James Taylor vs. James Welch, 6th Or., 199, de-

cided during the term from December term, 1876 to December term 1877.

We quote from the opinion 200-201:

"The rules of law applicable to this case seem to be well settled. Every proprietor of land through which flows a stream of water has a right to the use of the water flowing in its natural channel, without diminution or obstruction. (Washburn on Easements, 215.) The same rule applies to water which flows in a well-defined and constant stream in a subterranean channel (Angell on Watercourses, Sec. 112; Washburn on Easements, 364); but it does not apply to water percolating through the soil or even flowing through an unknown and undefined channel. (Washburn on Easements, 210; Washburn on Easements, 364.) These rules, together with the maxim that every person may use his own property as he pleases, provided such use is not an injury to another, are, we think, all the principles of law necessary to a decision of the case. The only question to be decided by us is one of fact. Does the evidence before us prove the existence of a constant and well-defined stream of water flowing in a subterranean channel, swale, spring, or basin on the land of defendant's described in the pleadings and evidence, to the spring described as Taylor and White's springs, in the evidence and upon the maps used in the argument before us, prior to the digging of the ditch complained of?"

This case was followed in a decision rendered at the October Term, 1881, being:

Shively et al vs. Hume et al, 10 Or., 76.

Mr. C. J. Lord, speaking for the Court said:

"There is no dispute as to the principles of law applicable to this case. Both parties cite with approbation Taylor v. Welch, 6 Or., 200, and rely upon the rules of law as therein enunciated as aplicable to, and controlling the facts of this case.

In Taylor v. Welch, supra, it was held that every proprietor of land through which flows a stream of water, has a right to the use of the water flowing in its natural channel, without diminution or obstruction, and that this was equally true of water which flows in a well defined and constant stream in a subterranean channel."

It was also held in said case that the obstruction and diversion of a stream from its course was a private nuisance and justified the interference of equity to prevent such action.

We also make the following quotation from another riparian case, decided at that October Term, 1881.

Shaw vs. Oswego Iron Works, 10th Or., 375-6 from which we copy: (Italics ours)

"Accordingly, streams of water have been divided into several distinct classes. First, Such rivers, or arms of the sea in which the tide ebbs and flows; and in these, which are technically called navigable, the sovereign is the owner of the subjacent soil, *and all right in it belongs exclusively* to the public. Second, Such streams as are navigable in fact for boats, vessels, or lighters; and in these, which are termed public highways, the public have an easement for the purposes of navigation and commerce, *but the title of the subjacent soil to the middle of the stream, and the right to the use of the water flowing over it is in the riparian owner,* subject to the superior rights of the public to use it for the purposes of transportation and trade. Third, Such streams as are so small or shallow as not to be navigable for any purpose; and in these the public have no rights of highway or otherwise, and they are altogether private property."

Morgan vs. Shaw, decided in May, 1884, is valuable here. It was decided a year *prior* to the issuance of peti-

tioner's patent. It deals with the law of riparian rights and with those acquired by appropriation. It is to the effect that the common law riparian rights can only be modified by appropriations made before the initiation of the riparian rights. This is the doctrine of "prior appropriation." Those who seek to confuse, speak of the "modified riparian rights" or "riparian rights modified by appropriation." But when the patent issues the riparian right cuts off the right to make any future appropriations affecting the lands. *Sturr vs. Beck* (cited) from this court is decisive of the point.

There are numerous Oregon decisions made prior to the decision in the Hood River case, to the effect that appropriations can only invade riparian rights on lands patented before the initiation of the appropriation, when the appropriator has, through his appropriation, deprived the riparian lands of the water under an adverse claim of right for the period of prescription, which in Oregon is ten years.

We quote from:

Morgan vs. Shaw, 47 Ore. 33, (83 Pac. 534).

Quotation is from page 337:

> "3. Much importance seems to be placed by defendant upon the averment in his answer that he diverted water from a stream at a point on the public domain, and that as the plaintiff failed to allege such fact in the complaint, he, having given evidence thereof at the trial, had established the better right. *This contention is without merit,* for where, as in this State, the common-law doctrine

of riparian rights, as modified by the rule of prior appropriation, is recognized, it follows that, as Dr. Stevens was a prior settler on public land through which the Middle Fork of Burnt River flowed, and his title to the premises secured from the United States related back to the date of his settlement, that stream was not flowing through public lands when the defendant made his diversion: *Brown v. Baker,* 39 Or. 66 (65 Pac. 799, 66 Pac. 193)."

OREGON CASES CLOSELY FOLLOWING THE ISSUANCE OF PETITIONER'S PATENT.

Petitioner purchased its property in question March 11th, 1921. (R. 180).

Between the date of the issuance of the patent, in 1885, and petitioner's purchase of the property in question, in 1921, to wit: On June 6th, 1886, the Supreme Court decided the Weiss case, which is still the leading Oregon case upon the subject. It is particularly important here because it was followed in Harris vs. Southeast Lumber Co., (quoted elsewhere), decided January, 1928, four years after the decision of the Hood River case. The Weiss case reaffirmed the doctrine of the prior cases, and discussed the common law riparian right in detail, and laid down the doctrine that while a riparian proprietor has the right to the use of the stream as it passes his lands, he cannot divert it from the lands of either riparian proprietor nor substantiatially diminish its quantity. This case is one involving the riparian use of water for mill or power purposes.

We make the following quotation:

Weiss v. Oregon Iron & Steel Company, 13 Or., 496 (11 Pac. 255). (1886).

Quotation from 498-9, 500, 501. And upon the subject of "injunction" from 503: (Italics ours).

"The facts show that one-fifth, or perhaps more, of the water of the stream is diverted from its natural course, and turned away from the other riparian owners. It differs essentially from a case in which a stream is diverted for manufacturing purposes, and the excess water not actually consumed in such use is restored to its natural channel. In a word, it is a case of a diversion of a part of a watercourse, not for ordinary purposes, but for manufacturing purposes, without restoring to the channel the surplus of water not actually used. The general doctrine relating to *watercourses* is, that every proprietor is entitled to the use of the flow of the water in its natural course, and to the momentum of its fall *on his own land*. The owner has no property in the water itself, but a simple usufruct. He may use it as it passes along, but he must send down to his neighbor below as much as he receives from his neighbor above. (Angell on Watercourses, Secs. 90, 94.) 'As a general proposition, every riparian proprietor has a natural and equal right to the use of the water in the stream adjacent to his land, without diminution or alteration.' (Washburn on Easements, 319.) 'Riparian proprietors are entitled, *in the absence* of *grant, license,* or *prescription limiting their rights,* to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration.' (Gould on Waters, Sec. 204.) Chancellor Kent says: 'Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it *another direction,* and he must return it to its ordinary channel when it leaves his estate. *Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity*

of water which would otherwise descend to the proprietors below.' (3 Kent's Com., Sec. 439.) 'Aqua currit et debet currere ut currere solebat', is the language of the ancient common law. The right to a watercourse begins ex jure naturae, and having taken a certain course naturally, it cannot be diverted to the deprivation of the rights of the riparian owners below. This is the language of all the common-law text books, and the decisions. (Angell on Watercourses, Sec. 93.) 'It is an ancient and well established principle,' said Weston, J., 'that water cannot be lawfully diverted, unless it is returned again to its accustomed channel, before it passes the land of the proprietor below. Running water is not susceptible of an appropriation which will justify the diversion or unreasonable detention of it.' (Blanchard v. Baker, 8 Greenl. 266.) 'The general rule of law is, that every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration.' (Lord Ellenborough in Bealy v. Shaw, 6 East, 208, 214.)

By settled principles of both the civil and common law, the riparian owner has a usufruct in the stream as it passes over his land, of which he cannot be deprived by mere diversion. (Pope v. Kinman, 54 Cal. 3.) As a result of the American and English cases, the common-law doctrine is thus summed up in the editorial note to Heath v. Williams, 25 Me. 209, S. C., 43, Am. Dec. 275; 'The general principle is, that every owner of land through which a natural stream of water flows has a usufruct in the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, without unreasonable detention or substantial diminution in quantity or quality, and none can make any use of it prejudicial to the other owners, unless he has acquired a right to do so by license, grant, or prescription.' The defendant, as riparian owner, has a right to the use of the stream

for its own necessary uses, but this right must be reasonably exercised, and there must be no substantial diminution or waste. It is entitled to use only so much of the stream as will not materially diminish its quantity, and it may use it for any legal purpose provided it returns the stream to its channel uncorrupted and without any essential diminution. Such use of a stream by riparian owners is to some extent a question of degree; and in all such cases the size and capacity of the stream is to be considered. The amount taken from a large running stream which would cause no sensible or practical diminution of its benefits to a lower proprietor would, if taken from a small stream, materially diminish its quantity and work a manifest injury. What is a reasonable use must necessarily depend upon the facts, considering the size of the stream and the amount appropriated. *But all the authorities concur that when the amount abstracted perceptibly or materially diminishes the quantity of the stream, such use of it by a riparian owner is unreasonable, and an infringement of the rights of other riparian owners, for which the law furnishes redress. The plaintiff is entitled to have the natural flow of the water in its accustomed channel, subject only to the diminution and retardation incident to a reasonable use.* WHATEVER GOES BEYOND THIS IS AN INFRINGEMENT OF HIS RIGHTS IN THE STREAM WHICH MAY FORM THE BASIS OF A PRESUMPTION OF A GRANT BY LAPSE OF TIME, AND NECESSARILY IMPORTS DAMAGES, AND ENTITLES HIM TO THE PROTECTION OF THE LAW. (PLUMLEIGH V. DAWSON, 1 GILM. 544.) AND MR. ANGELL SAYS: 'THAT A DIVERSION OF A WATERCOURSE, WITHOUT ACTUAL INJURY TO A RIPARIAN OWNER LOWER DOWN THE STREAM, LEGALLY IMPORTS DAMAGES

(BECAUSE IT IS AN INFRINGEMENT OF A RIGHT) IS A DOCTRINE POWERFULLY SUSTAINED BY AMERICAN AUTHORITIES.' (Angell on Watercourses, Sec. 135.) *Now, the counsel for the defendant, while admitting that the rule of the common law as to riparian owners is fatal to the claim of the defendant upon the facts, insists that the rule itself needs to be liberalized,* and that the case presented is a forcible illustration of the hardship and injustice of its operation, and of the duty of the court to so extend or liberalize it as to protect the defendant from the burdens and unjust exactions which must be the consequences of its strict application. His argument in effect is, that the amount of water abstracted and diverted is necessary to carry on the defendant's business, which is a laudable enterprise that deserves, on account of the supposed benefits to accrue from its successful establishment, to be encouraged and protected, and that such use of the water, although it may sensibly diminish the supply of the stream, will leave a sufficient quantity to flow in its accustomed channel for all present and prospective purposes to which the plaintiff can apply it. But as Black, J., said in Wheatly v. Chrisman: *'The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both.* The defendant had a right to such use as he could make of the water without materially diminishing it in quantity .... If he needed more he was bound to buy it. However laudable his enterprise may be, he cannot carry it on at the expense of his neighbor. One who desires to work a lead mine may require land and money as well as water, but he cannot have either unless he first makes it his own' (24 Pa. St. 302.) * * *

Nor do we think the objection to the exercise of the jurisdiction well taken. Mr. High says: 'A riparian proprietor owning to the center of a stream is entitled to the aid of equity to prevent a diversion of the waters from their natural channel.

> Nor does the neglect of complainants to use or appropriate the *water-power,* or the fact that they have as yet sustained but small pecuniary damage, or that defendants would be subjected to heavy expense if compelled to restore the water to its original channel, present such objections as would warrant a court of equity in refusing the relief.' (High on Injunctions, Sec. 795, and authorities cited.)"

RIPARIAN RIGHTS AND RIGHTS BY APPROPRIATION ACQUIRED PRIOR TO ENACTMENT OF THE WATER CODE

By the act of 1866, Congress gave formal sanction to water appropriations upon *public* lands. It is said by Wiel, as quoted in the majority opinion at R. 426 (73 Fed. 2nd at 561) that the act gave formal sanction to the prevailing theory of a grant to the holders of existing rights upon public land, and that the statute had chiefly in view the protection of appropriations already made, rather than future ones.

This act was further amended by the act of July 9, 1870. By Section 17 thereof, it was provided that patents granted on preemptions or homesteads should be subject to any vested and accrued water rights which may have been acquired under Section 9 of the Act of July, 1866.

This court in *Sturr v. Beck,* cited below, discussed the comparative rights of such appropriations as compared with the riparian rights of those who settled upon and obtained patent to lands riparian to the same stream.

In *Sturr v. Beck* it was held that when the government ceased to be the sole proprietor, the right of the riparian owner attached and could not be subsequently invaded.

The knowledge of the holding of this court in *Sturr v. Beck* reached the Supreme Court of Oregon while it had under consideration *Faull v. Cooke,* cited below, and the Oregon court held that *Sturr v. Beck* conclusively settled the contentions in *Faull v. Cooke,* that the questions involved were identical, and that the homestead claimant's riparian rights attached from the date of his settlement, provided he complied with the law and obtained the patent, and that such patent related back to the date of the settlement and cut off any right to divert a stream running through the homestead. Because of these interesting circumstances, we quote from these two cases.

Sturr, Appellant, v. Beck, 133 U. S. 541-552, 33 Law Ed. 761. (Decided March 3, 1890).

Quotation from Mr. Chief Justice Fuller, Law Ed. page 763-4-5:

"John Smith settled on the tract of land described in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to Beck, the appellee. He made his homestead filing or entry March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The water of False Bottom Creek flowed in its natural channel over and across Smith's homestead, and in May, 1880, Sturr, the appellant, went upon that homestead, located a

water right thereon and constructed a ditch which diverted the waters of the creek to his own adjacent land. Beck went into possession under the deed from Smith, and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, and this suit thereupon followed.

It is not contended on behalf of Sturr that he is entitled to maintain the ditch because he constructed and used it, or that Smith's acquiescence amounted to anything more than a revocable license. There was no grant nor an adverse enjoyment so long continued as to raise a legal presumption of a grant. But it is insisted that the doctrine of prior appropriation of water on the public land and its beneficial use protects him from interference because neither Smith nor Beck made any water right location claiming the waters of False Bottom Creek, and had never diverted those waters prior to Sturr's location.

If, however, Smith obtained a vested right to have the creek flow in its natural channel by virtue of his homestead entry of *March* 25, 1879, and possession *thereunder,* or if *his patent* took effect as against Sturr by relation as of *that date,* then it is conceded that Sturr cannot prevail and the judgment must be affirmed.

The right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters as a natural incident to, or one of the elements of, his estate, and that it cannot be lawfully diverted against his consent, is not denied, nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor of a prior appropriator, as between himself and Sturr, when the latter undertook to locate his alleged water right. At that time Smith had been in possession for three years, and his homestead entry had been made over a year. * * *

By Section 17 of the Act of July 9, 1870, amen-

datory of the Act of July 26, 1866, it was provided, among other things, that 'all patents granted, or pre-emption or homesteads allowed, shall be subject to any *vested* and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as *may have been acquired* under or recognized by the ninth section of the Act of which this Act is amendatory.' 16 Stat. 218. And this was carried forward into section 2340 of the Revised Statutes, and *Smith's patent was subject to that reservation.*

The 9th section of the Act of 1866 is referred to by Mr. Justice Field in *Atchison v. Peterson,* 87 U. S. 20 Wall. 507, 512 (22: 414, 416), and in the opinion it is said that 'the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams.'

WHEN, HOWEVER, THE GOVERNMENT CEASES TO BE THE SOLE PROPRIETOR, THE RIGHT OF THE RIPARIAN OWNER ATTACHES, AND CANNOT BE SUBSEQUENTLY INVADED. As the riparian owner has the right to have the water flow *ut currere solebat,* undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriations of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."

We come now to the Oregon case

Faull v. Cooke, 19 Or. 455-466, 26 Pac. 662. (July 1st, 1890).

Quotation from page 463:

"In *Larsen v. The O. R. & N. Co.,* decided at the present term, it was held, in effect, that a set-

tlement made by a homestead claimant upon the public lands of the United States and compliance with act of congress on the subject, segregated the same from the public lands and cut off intervening claims, and such is the ruling of the land department of the United States.

Since the announcement of the opinion in *Larsen v. The O. R. & N. Co., supra,* this case was argued, and *our attention has been called to the recent opinion of the Supreme Court of the United States in Steers v. Beck,* 10 Fed. R. 350.

The opinion of the court in that case is very exhaustive, and fully and conclusively settles the legal question under consideration adversely to the appellant. In that case the identical question, in principal, involved here was presented, and it was held that a *homestead claimant's riparian rights attached from the date of his settlement,* provided *he complied with the law* and obtained a patent for the land, and that when such patent was issued it related to the date of settlement *and cut off the right to divert a stream of water running through such homestead."*

In

Brown v. Baker, 39 Or., 66-75 (65 Pac. 799; 66 Pac. 193). Decided July 15. 1901.

Quotation from page 68-69:

"1. It is maintained by defendant's counsel that in order to secure priority in the appropriation of water, the stream or lake from which it is taken must be tapped at some point on the public domain, and that, the plaintiffs have alleged that they and their prantors diverted the water of Willow Creek at points on their own premises, shows that no such appropriation had been made, and hence the court erred in overruling the demurrer to the complaint, and in awarding to plaintiffs the use of any water from said stream. The water of a non-navigable stream is an incident to the soil through which it flows, and, as the United States is the primary pro-

prietor of public lands, its grant of the waters thereof, in the Pacific Coast states, to the person having the priority of its possession (14 Stat. U. S. 253, c. 262), in the absence of a constitutional provision or statute declaring water to be public property, necessarily cuts off the right of a subsequent settler to divert the water under a claim of prior apropriation. Title by relation gives to the first settler upon the public land the priority of possession of the water flowing through the same, (*Faull v. Cooke*, 19 Or. 455, 26 Pac. 662, 20 Am. St. Rep. 836; *Larsen v. Oregon Ry. & Nav. Co.*, 19 Or. 240, 23 Pac. 974; *Johnson v. Bridal Veil L. Co.*, 24 Or. 182, 33 Pac. 528; *Cole v. Logan*, 24 Or. 304, 33 Pac. 568), though he may never appropriate the water to a beneficial use. If a lower riparian proprietor had acquired a right to the waters of Willow Creek prior to plaintiff's diversion, such right would necessarily defeat their appropriation of water, because the stream at the time of the diversion was not flowing through public lands. The right of prior appropriation is limited to the use of water by the pioneer settler BEFORE ANY ADVERSE CLAIMS OF RIPARIAN PROPRIETORS ATTACH TO THE STREAM FROM WHICH THE WATER IS TAKEN, and not to the points of diversion, which may be either within or beyond the boundaries of the tract selected by such settler."

BOTH BEFORE AND AFTER THE ADOPTION OF THE CODE, RIGHTS BY APPROPRIATION WERE HELD TO ONLY BE SUPERIOR TO THE RIPARIAN RIGHTS WHEN THE LATTER HAD BEEN DESTROYED BY ADVERSE USE OF THE WATER FOR THE PERIOD OF PRESCRIPTION.

One of the dissenting opinions in the Hood River case was that of Mr. Justice McCourt, which is at 114

Or. 213-248. This reference is not for the purpose of quoting a dissenting opinion.

In making this quotation we have inserted the dates of the decisions, respectively. They are cases decided at about the time of the enactment of the water code. All but two of the decisions were rendered prior to the code's adoption.

We quote from page 236:

> "To initiate title to the use of water by adverse user, as against a riparian owner, there must be a hostile invasion of the rights of the latter to use the water, asserted in such a way that the owner may know of the claim, and adverse title can only arise where such adverse use has been exclusive, continuous and uninterrupted under a claim of right for ten years: *Bowman v. Bowman,* 35 Or. 279, 283 (57 Pac. 546) (1889); *Carson v. Hayes,* 39 Or. 97 (65 Pac. 814) (1901); *Oregon Construction Co. v. Allen Ditch Co.,* 41 Or. 209, 216 (69 Pac. 455, 93 Am. St. Rep. 701) (1902); *Britt v. Reed,* 42 Or. 76, 83 (70 Pac. 1029, 1030) (1902); *Davis v. Chamberlain,* 51 Or. 304 (98 Pac. 154) (1908); *Ison v. Sturgill,* 57 Or. 109, 118 (109 Pac. 579, 110 Pac. 535) (1910); *Cantrall v. Sterling Min. Co.,* 61 Or. 516, 524 (122 Pac. 42) (1912)."

STATE ENGINEER'S PERMITS

Tobey v. Bridgewood, 127 Pac. 178-185 (Supreme Court of Idaho. Oct. 3, 1912):

Quotation from page 181:

> "The permit, therefore, is not an appropriation of the public waters of the state. It is not real property under the statutes. Rev. Codes. Sec. 3056; *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.,* 5 Idaho, 793, 51 Pac. 990, 40 L. R. A., 485. A permit, however, is the consent given by the state

to construct and acquire real property. In order to acquire a permit, the statute provides that the person, association, or corporation, intending to acquire the right to the beneficial use of the waters of any natural stream,' etc. This doctrine is also announced in the case of *Nielson v. Parker,* 19 Idaho, 727, 115 Pac. 488."

And to the same effect is:

"Washington State Sugar Co. v. Goodrich, 147 Pac. 1073, 1076. (Supreme Court of Idaho, April 28, 1915):

in which such a water claim is held to be a "mere declaration of intention to create a water right which may never be anything more than an intention."

Basinger v. Taylor, 164 Pac. 522-528. (Supreme Court of Idaho, April 3, 1917).

Quotation from page 524:
(Italics ours).

"Without reference to the question of title, however, respondent Taylor could not rely upon permit No. 2929 in this case. The issue presented by his cross-complaint is ownership of a water right, and on this issue the holding of a permit from the state engineer, in and of itself, has *no probative force. A permit* from the state engineer is not a water right, and this court has *held that it is not an appropriation* of the public waters of the state and is not real property. *Speer v. Stephenson,* 16 Idaho, 707, p. 716, 102 Pac. 365; *Ada County Farmers' Irrigation Co. v. Farmers' Canal Co.,* 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485."

The Idaho Supreme Court in

Marshall v. Niagara Springs Orchard Co., 125 Pac. Rep. 208-213. (Supreme Court of Idaho. June 8, 1912).

denied the right of an appropriator to enter upon pat-

ented land for the purposes of surveying, etc., without some right from the owner by agreement, condemnation or otherwise. (Quotation from p. 211).

> "In this instance, therefore, it appears clearly from the record that, in making the entry upon the lands of the appellant for the purpose of making the surveys and plans and maps upon which his application to appropriate the water was based, the respondent was a trespasser upon the lands of the appellant."

FOLLOWING THE CODE ADOPTION, WATER RIGHTS WERE DETERMINED IN THE OREGON COURT UNDER THE COMMON LAW RIPARIAN DOCTRINE, AND THE DOCTRINE OF APPROPRIATION, AS ABOVE STATED, WITHOUT CONSIDERATION OF THE CODE, UNTIL IN RE WILLOW CREEK, CITED BELOW.

We quote from:

> *In re Willow Creek*, 74 Or. 593-655, (144 Pac. 505, 146 Pac. 475), (1915), AN ADJUDICATION under the code.

Quotation from Oregon Report, pages 626-7:

> "22. In *Jones v. Conn*, 39 Or. 30 (64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630), it was held in a controversy between riparian proprietors upon a natural watercourse, that a riparian proprietor has a right to the use and enjoyment of the water that naturally flows past or through his land, subject to the right of other riparian owners to a reasonable use thereof for domestic, agricultural and manufacturing purposes, provided that the upper proprietor does

not appropriate enough to substantially injure the common right which each proprietor has. * * * *The doctrine of prior appropriation and riparian rights is not so antagonistic that they may not exist in the same locality.* A settler on a non-navigable stream has the election either to rely upon his rights as riparian proprietor or to make an appropriation of the water and claim as an appropriator, but he cannot do both: *Williams v. Altnow,* 51 Or. 277, 300 (95 Pac. 200, 97 Pac. 539); *Crawford v. Hathaway,* 60 Neb. 754 (84 N. W. 271); *Crawford v. Hathaway,* 61 Neb. 317 (85 N. W. 303); *Crawford v. Hathaway,* 67 Neb. 325 (93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889)."

Page 627:

"24. In the arid and semi-arid lands of the west the early home-builders first settled upon the streams and other bodies of water. The rights of such people to a reasonable use and benefit of the water flowing over their lands which they have appropriated or used for a beneficial purpose should be carefully considered and not abrogated. Those obtaining title to land take the same subject to the laws *then* prevailing and defining the appurtenances thereto. When *such rights have become vested,* they cannot be taken away by legislative enactment nor judicial decree. Like all property they are subject to reasonable regulation."

Page 624:

"By act of Congress, July 26, 1866, Chapter 262, 14 Stat. 253 Section 9, (§2339, R. S. U. S., 7 Fed. Stats. Ann. 1090, 1093, U. S. Comp. Stats. 1913, § 4647), whenever rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued *by priority of possession and are acknowledged by local customs, laws, and decisions of courts, the same are recognized and protected. This act established no new*

right. The practical construction of this statute has been that as long as the land belonged to the United States the water flowing over the same was subject to appropriation for any of the purposes named when such appropriation was recognized by the local customs, laws or decisions of the courts; but if the water was not so appropriated, it was not subject to appropriation after the land over which it flowed became private property: Davis v. Chamberlain, 51 Or. 304, 315 (98 Pac. 154); *Broder v. Water Co.* 101 U. S. 274, (25 L. Ed. 790); *Rio Grande Western R. R. Co. v. Telluride P. & T. Co.,* 16 Utah, 125, 137 (51 Pac. 146); *Benton v. Johncox,* 17 Wash. 277, 287 (49 Pac. 495, 61 Am. St. Rep. 912, 39 L. R. A. 107); *Sturr v. Beck,* 133 U. S. 541 (33 L. Ed. 761, 10 Sup. Ct. Rep. 350)."

The foregoing case, In re Willow Creek, had the careful consideration of this Court in,

Pacific Livestock Co. vs. Lewis, 241 U. S. 440, 60 Law Ed. 1084, Cited at 241 U. S. 448-9.

A consideration of that case was doubtless in part responsible for this Court's construction of Section 1 (Appendix 1), and Section 70 (Appendix 29, 30, 31). There this Court construed the language of those two sections, to the effect that the Water Code was not intended to take away or impair any vested rights of the riparian proprietor. (241 U. S. 445).

Without the construction in Re Willow Creek the Court would doubtless have so construed Section 1 and Section 70 of the Code as showing that it was not the intention of the Legislature in the enactment of the Code, to impair in any way such vested rights of

riparians. But with the construction in Re Hood River, it would seem that this Court must have held with the appellants in the Livestock case.

Numerous adjudications followed In Re Willow Creek. Most of these are not helpful on the matters involved here.

In *Re Sucker Creek,* 83 Ore. 228, (163 Pac. 430). (1917).

We quote from the opinion of Mr. Justice Harris at 233:

> "1. Quoting from her printed brief the appellant says that this appeal presents one question: 'Has Mrs. Leonard waived her riparian rights for the irrigation of her land?' Sucker Creek crosses both the Caldwell place and the Home place and all the lands of the two farms are riparian within the meaning of the precedents of this jurisdiction. It is now too late, however, to debate whether a riparian owner can divert and use water from a stream by virtue of a right acquired by prior appropriation and also assert a right to the surplus as a riparian owner. Repeated decisions have wedded this court to the doctrine that a settler upon a non-navigable stream has an election either to rely upon his rights as riparian proprietor or to make an appropriation of the water, if it is subject to appropriation, and claim as an appropriator, but he cannot do both. One can only be acquired by active and affirmative steps, while the other is incident to and, in the absence of a waiver or other loss of the right, accompanies the ownership of riparian lands. To use the water of a stream as a prior appropriator is to waive the right to use the water of that stream as a riparian owner: *Low v. Schaffer,* 24 Or. 239, 246 (33 Pac. 678); *North Powder Co. v. Coughanour,* 34 Or. 9, 22 (54 Pac. 223); *Brown v. Baker,* 39 Or. 66, 70 (65 Pac. 799, 66 Pac. 193);

Williams v. Altnow, 51 Or. 275, 300 (95 Pac. 200, 97 Pac. 539); *Davis v. Chamberlain,* 51 Or. 304, 310 (98 Pac. 154); *Andrews v. Donnelly,* 59 Or. 138, 144 (116 Pac. 569); *Bowen v. Spaulding,* 63 Or. 392, 395 (128 Pac. 37).

2, 3. The right of appropriation is incompatible with the rule of riparian proprietorship. The doctrine of appropriation excludes the idea of equality and makes each water right superior to all others subsequently intiated and completed and inferior to all that have been previously acquired, while the characterizing feature of riparian ownership when aplied to irrigation is equality or, perhaps to speak more exactly, the right of each person is correlated with the right of every other person, although a riparian owner may take all the water in the stream if needed to satisfy domestic wants."

The opinion continues with the statement that appropriations can be exercised by fixed rules, and the amount definitely determined. But that the exact amount to be used by a riparian proprietor cannot ordinarily be ascertained in advance because it must be exercised in subordination to the rights of the riparian proprietor. (page 235).

The decision then determined that Leonard had waived her right to claim as a riparian proprietor and elected to proceed and claim as an appropriator, by insisting upon a definite quantity of water, and insisting upon priorities of use. (pages 235-6).

The next Oregon decision in point of time of importance here is

Logan v. Spaulding Logging Co., 100 Ore. 731, 736, (190 Pac. 349). (1920). Rehearing denied Feb. 15th, 1921.

We quote from it in the body of the brief. It is to the effect that an Act impairing a riparian right violates the Oregon Constitution in taking property without compensation.

That decision was rendered in June, 1920; Rehearing denied February 15, 1921, prior to petitioner's purchase of its lands.

We make the following quotation from:

In Re Water Rights of Hood River, 114 Or. 112; (227 Pac. 1065) (1924).

Quotation from pages 181-182:

"It was within the province of the legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor: *Kansas v. Colroado,* 206 U. S. 46, 94 (51 L. ed. 956, 973, 27 Sup. Ct. Rep. 655, see also, Rose's U. S. Notes); *Sternberger v. Seaton,* 45 Colo. 401, 403 (102 Pac. 168); *Clark v. Nash,* 198 U. S. 361 (4 Ann. Cas. 1171, 1174, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676); *Atchison v. Peterson,* 87 U. S. 508 (22 L. ed. 414); *Boquillas L. & C. Co. v. Curtis,* 213 U. S. 339 (53 L. ed. 822, 29 Sup. Ct. Rep. 493); *Van Dyke v. Midnight Sun M. & D. Co.,* 177 Fed. 85 (100 C. C. A. 503); *United States v. Rio Grande Irr. Co.,* 174 U. S. 690, 703 (43 L. ed. 1136, 19 Sup. Ct. Rep. 770, see also, Rose's U. S. Notes).

The statute of this state plainly declares that all waters within the state from all sources of water supply belong to the public: Section 5715, Or. L. This is, of course, subject to the further provision of the act. As we have noted the courts of this state and other states and of the United States have upheld the legislative enactments of this state and other similar statutes. Rights to public waters can

be acquired as provided by the several statutes of this state: *Cookingham v. Lewis,* 58 Or. 484, 490 (114 Pac. 88, 115 Pac. 342); *Caviness v. La Grande Irr. Co., supra.*

Under our present statute defining what shall constitute a vested right of a riparian proprietor, the claim of the Pacific Power & Light Company as a riparian owner of land on Hood River to a continuous flow of the specified quantity of water over its land cannot be maintained." (The reference to our present statute is a reference to the Water Code.)

The reference in the above quotation to O. L. 5715 refers to Oregon Laws 47-401, which reads:

"All Water within the state from all sources of water supply belongs to the public."

This Act is Chapter 221 of the Laws of 1909, passed at the same Session as the enactment of the Water Code. It was filed in the office of the Secretary of State February 24, 1909, but having no emergency clause it would not become operative for a period of three months from the adjournment of the Legislature. (Article IV, Section 28 Oregon Constitution.) The Session closed February 20, 1909.

So in point of enactment it is subsequent to the Water Code. Its title is:

"An Act Providing for Granting Franchises of Water Power by the State, and Collecting Fees Therefor."

Section 1. Provides as above stated.

Section 2. Requires all who appropriate water after the passage of the Act for the development of power, shall pay certain fees therein specified.

Section 3. Provides for the apportionment of fees paid.

Section 4. Provides that after the appropriation is complete he "shall own and enjoy all of the uses thereof as long as he pays the annual fees therefor," etc.

Section 4. Further provides that certain matters may be put up to the Board of Control (not material here).

Section 5. Provides that one aggrieved by the action of the Board may appeal to the Circuit Court for the county in which the proposed appropriation of water is situated.

Section 6. Provides that in case a Board should not be created by law, the duties imposed by the Act upon the Board shall devolve upon the State Engineer.

At the time when the Hood River case was pending before the Supreme Court of Oregon, there was also pending the case from which we quote known as the

NORWOOD CASE

Norwood v. Eastern Oregon Land Company, 112 Or. 106; (227 Pac. 1111), (1924).

Quotation from page 111 of the Oregon report

> "2. The riparian rights of the defendant company, as such, date back to the year 1867 *when it and its predecessors in title acquired the ownership of the land.*"

and from pages 113-4:

> "According to the record, all that the company has ever had or claimed to hold is a riparian right. Such a right is appurtenant to the land. In *Jones v. Conn,* 39 Or. 30, 34 (64 Pac. 855, 65 Pac. 1068,

87 Am. St. Rep. 634, 54 L. R. A. 630, 53 Cent. L. J. 128), Mr. Chief Justice Robert S. Bean used the following language: 'It is often said that a riparian proprietor has a right, inseparably annexed to the soil, to have the Water of a stream flow down to his land as it is wont to run, undiminished in quantity and unimpaired in quality.'

In *Brown v. Baker,* 39 Or. 66 (65 Pac. 799, 68 Pac. 193), Mr. Justice Moore said: 'The water of a non-navigable stream is an incident to the soil through which it flows.'

* * * Riparian rights are purely local, inseparably annexed to the lands washed by the stream at *the place where they border on its waters.* Such rights cannot be divorced from the adjacent lands."

and from page 116:

"We remember that, as determined by the decree of adjudication, the title to the defendant's land was acquired prior to the passage of the Desert Land Act of March 3, 1877, to which reference has been made. *The title of the defendant therefore carried with it the common-law riparian rights which have always been recognized in this state."*

The Court further, at page 117, said:

"The first section of that act says:

'Subject to existing rights, all water within the state may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water.'

Again, in Section 70 of that act it is said:

"Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.'

The opening declaration of the act was that

waters within the state may be appropriated for beneficial use. *The title of the act,* so far as existing rights were concerned, *limits the operation of the statute to 'the determination of existing rights.' Thus controlled in the title of the act as well as by the terms thereof, the legislature could not and did not add to or subtract from the scope of then existing rights."*

We discuss the Norwood Case below, under the title of "The Harris Case."

Harris v. Southeast Portland Lumber Co., 123 Or. 549 (262 Pac. 243) (1927)

(THE HARRIS CASE)

The appellate court followed the Hood River Case in holding that petitioner's vested common law riparian right had been destroyed by Section 70 of the Water Code, but the Oregon Court has never been able, except in this one spasmodic decision by a divided court, to abandon the common law riparian right doctrine in lands that had been patented before the passage of the Water Code. The Norwood case (cited) was before the Oregon Court at the same time that it was considering the Hood River case.

The appellate court in the instant opinion stated that the Hood River and the Norwood cases were decided upon the same day. It seems to have a prior date, but following the opinion in the Norwood case there is, at 112 Oregon 119, an opinion by Mr. Justice Bean (called "Concurring in part, dissenting in part.") It was this Justice who wrote the prevailing opinion in the Hood River case, and in this concurring and dissenting opin-

ion in the Norwood case, page 119, is found this statement:

> "The question of riparian rights is fully discussed in the several opinions in *re Hood River*, 227 Pacific, 1065, and it is unnecessary to further comment thereon." (It will be noted in the citation below, that the Pacific reference to the Norwood case is 227 Pacific 1111).

These two cases were decided in 1924,—thirty-eight years after the decision in 1886 of *Weiss v. Oregon Iron and Steel Co.*, 13 Or. 508, quoted in the appendix here, at pages 52-56, and thirty-seven years after the issuance of petitioner's patent.

The majority opinion in the Norwood case held that, except for the construction of the Desert Land Act, the common law rights had always been recognized in Oregon. (From page 116 of 112 Oregon.)

The Harris case, cited below, was decided December 20, 1927, three years after the decisions of the Hood River case and the Norwood case. It went back to *Weiss v. Oregon Iron & Steel Co.*, 13 Or. 496, and reaffirmed the common law riparian doctrine as announced there, and also considered the effect of an adverse appropriation on riparian rights out of the stream from which the appropriation was made.

We quote:

> *Harris v. Southeast Portland Lumber Co.*, 123 Or. 549; (262 Pac. 243)

from 556-557 of the Oregon report:

> "In this country it is very generally held that a

title by prescription to a corporeal or incorporeal hereditament may be acquired by an uninterrupted enjoyment for the period limited by statute for the right of entry upon land, and that it is the policy of the law to limit the presumption of a grant to periods analogous to those of the statute of limitations in cases where such statutes do not directly apply, and that there is no difference in the doctrine whether the grant relates to corporeal or incorporeal hereditaments; Angell on Watercourses (7 Ed.), § § 204-209. In *Weiss v. Oregon Iron & Steel Co.*, 13 Or. 496 (11 Pac. 255), this court, speaking through Mr. Justice Lord, said:

'Riparian proprietors are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration. * * The general principle is, that every owner of land thru which a natural stream of water flows has a usufruct in the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, without unreasonable detention or substantial diminution in quantity or quality, and none can make any use of it prejudicial to the other owners, unless he has acquired a right to do so by license, grant, or prescription.'"

After making the foregoing quotation from the 13th Oregon, the opinion in the Harris case, continues:

"The rights claimed in this suit are purely riparian in their nature and, as such, each proprietor, in the absence of grant, license or prescription limiting his rights, may insist that the stream shall flow to his land in the usual quantity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its usual level, and this right is a right of property inseparably annexed to the soil itself and exists *jure naturae* as parcel of the land, which

right will not be suspended or destroyed by mere nonuser, although it may be extinguished by the long continued adverse enjoyment of others: Gould on Waters (3 Ed., Sec. 204). The evidence of a right by prescription 'ought always to be clear and conclusive.' *McRae v. Small*, 48 Ore., 139 (85 Pac. 503)."

ADDITIONAL AUTHORITIES UPON COMMON LAW RIPARIAN RIGHTS

U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 19 Sup. Ct. 770, at 43 L. Ed. 1136, 1141; (1899).

quotation from 174 U. S. at 702:

"The unquestioned rule of the common law was that *every riparian owner* was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, Sec. 439):

'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple *usufruct* while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land *as an incident to the land* he cannot unreasonably detai nit, or give it *another direction* and he must return it to its ordinary channel when it leaves his state'."

Nebraska

Clark v. Cambridge & A. Irr. & Imp. Co., et al, N. W. Vol. 64, p. 239, 241. (Supreme Court of Nebraska, Sept. 18, 1895).

In the above case the Supreme Court of Nebraska was considering an irrigation statute modelled after that of California. Its decision quoted *Lux v. Haggin*, 69th Cal., 255, which held that the California irrigation statute, allowing the appropriation of water for irrigation purposes, could not be construed to apply to waters on riparian lands that were acquired *before* or since the adoption of the Code.

The Supreme Court of Nebraska said:

> *"It may be that our statute, unlike the Code of California, was intended to embrace all waters of the state,* since it is an historical fact, of which we take notice, that the public lands along the streams of this state had practically all been disposed of previous to 1889. But it is unnecessary to pursue the subject at this time, for assuming such to have been the intention of the legislature, it is a clear invasion of private rights, and within the prohibition of the constitution. The right of a riparian proprietor, as such, *is property and, when vested,* can be destroyed or impaired only in the interest of the general public, upon full compensation, and in accordance with established law. *Lux v. Haggin, supra; Yates v. Milwaukee,* 10 Wall. 479; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.,* 109 U. S. 672, 3 Sup. Ct. 445, and 4 Sup. Ct. 15; *Delaplaine v. Railway Co.,* 42 Wis. 214; *Bell v. Gough,* 23 N. J. Law, 624; *Water Co. v. Raff,* 36 N. J. Law, 335."

California Prior to its Constitutional Amendment of 1928

Fall River Valley Irr. Dist. v. Mt. Shasta Power Corporation, 259 Pac. 444, 448. (Supreme Court of California, Sept. 1, 1927).

"A re-examination of the nature of the riparian right in the light of the facts of this case leaves us entirely satisfied with our previous pronounce-

ments upon this subject. We therefore here reassert the riparian right to be a vested property right inhering in and a part and parcel of the abutting lands—a right not gained by use or lost by disuse—a right (qualified only by the correlative rights of other riparian proprietors) to use the entire ordinary and natural flow of the stream for all lawful riparian uses and also to have all such flow come down to the land undiminished other than by the lawful uses by upper riparian proprietors or by the rights of those who have otherwise obtained a superior claim to the use of a portion of the stream. This right to use the water of the stream we hold to be entitled to the same respect and protection at the hands of the *law as any other vested property right.*"

R. C. L. Vol. 27—Waters, (page 1071)

"12. Riparian Rights as Property — Riparian rights are an incident to the ownership of the land adjacent to the water, and may be lost by grant, condemnation, or prescription. They cannot be taken by the state even for a public use without compensation to the owner, and cannot be taken at all or impaired for a private use. They constitute property that may be the subject of bargain and sale and are a part of the owner's estate in the land, and materially enter into the actual value. They exist with such ownership, and pass with the transfer of the land without any designation in the conveyance."

South Dakota

St. Germain Irrigating Co. v. Hawthorn Ditch Co., 143 N. W., 124-128. (Supreme Court of South Dakota. Sept. 23, 1913).

Quotation from page 126:

"(2) 'Every person, through whose land a natural water-course runs, has a right, *publica juris*, to the benefit of it for all useful purposes to which

it may be applied, and no proprietor of land, on the same water-course, either below or above has a right to unreasonably divert it from flowing upon and onto his premises or to obstruct it in passing from them or to corrupt or destroy it. This riparian right is inseparably annexed to the soil, not as an easement nor as an appurtenance, but as a part and parcel of the land itself. Use does not create it, and disuse cannot destroy or suspend it.' *Johnson v. Jordan,* 2 Metc. (Mass.) 239, 37 Am. Dec. 85; *St. Helena Water Co. v. Forbes,* 62 Cal. 182, 45 Am. Rep. 659; *Shamleffer v. Council Mill Co.,* 18 Kan. 24; *Rigney v. Tacoma L. & W. Co.,* 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Lux v. Haggin,* 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *Schriver v. Smith,* 100 N. Y. 471, 3 N. E. 675, 53 Am. Rep. 224; *Whitney v. Wheeler Mill Co.,* 151 Mass. 396, 24 N. E. 774, 7 L. R. A. 613; *Duckworth v. Water Co.,* 150 Cal. 520, 89 Pac. 338; *Turner v. James Canal Co.,* 155 Cal. 82, 99 Pac. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, and note; *Redwater Canal Co. v. Jones,* 27 S. D. 194, 130 N. W. 85; *Redwater Canal Co. v. Reed,* 26 S. D. 466, 128 N. W. 703; *Lone Tree Ditch Co v. Cyclone Ditch Co.* 15 S. D. 519, 91 N. W. 352; *Stenger v. Tharp,* 17 S. D. 13, 94 N. W. 402. The right of a riparian owner to make a reasonable beneficial use of the waters of a flowing stream for domestic and irrigation purposes is a *vested property right* and is entitled to protection to the same extent as property rights generally. It is *within the purview of a constitutional provision prohibiting the taking of property for public use without compensation. McCook Irrigation Co. v. Crews,* 70 Neb. 109, 96 N. W. 996; *Crawford Co. v. Hathaway,* 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647. Vested property rights in waters in this state, whether held as riparian or by prior appropriation, could not thus be taken or confiscated or interfered with by any such act of the Legislature."

Kinney on Irrigation and Water Rights

Kinney, (2nd Ed.) Vol. II, Sec. 817:

Quotation beginning on page 1432:

"§ 817. Appropriations and Riparian Rights—Effect of Desert Land Act of 1877.—Section 1 of the Desert Land Act of March 3, 1877, among other things, provided: 'And all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights.' It is viewed by some authorities that this provision abolished even 'the so-called modified doctrine of riparian rights,' as to all lands through which non-navigable streams flow, the title to which has been acquired from the Government of the United States since the passage of that act, even in those Western States which had theretofore adhered to this common-law rule as one of their dual systems of laws governing the use of the waters flowing within their respective boundaries; and, that thereafter all waters flowing within the boundaries even of these States were subject to the law of appropriation only. We do not believe that this is the correct construction to give to the provisions quoted in the Act of 1877. The trouble seems to be in confusing the rights of the United States as the proprietor and as sovereign. To be sure, the United States was primarily the owner and proprietor of both the public lands and the waters flowing over them. The Government is still the owner and proprietor of all the surplus waters flowing over its lands, to which vested rights have not attached. But the United States has not the soverign control over waters which flow within the boundaries of a certain State, except so far as it has reserved the waters of the natural streams for the general use of the public for navigation, and for its own uses as a

riparian owner or otherwise upon the Government reservations and lands used by the Government itself for some purpose. We do not believe that Congress has the power to abolish the law of riparian rights either in the Western or Eastern States, where a State by its laws has declared that, governing the subject of waters, the common law shall be followed. The sovereignty, jurisdiction, and control over all waters flowing within the boundaries of a State are left, with the exceptions above mentioned, to the laws of that State upon its admission to the Union. That State may adopt the common-law as it is strictly construed in England and in the Eastern States of this country; it may adopt the modified form of that law as has been done to meet the peculiar conditions in the Western States; or, upon the other hand, it may entirely abolish the common law upon the subject of waters and adopt in lieu thereof the Arid Region Doctrine of appropriation only; or again, it may adopt both the common law and the doctrine of appropriation. But, as far as Congress is concerned, it can not force any particular law governing waters upon any State. As was said by Mr. Justice Brewer in the case of *Kansas v. Colorado,* 'It may determine for itself whether the common law rule in respect to riparian rights, or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation, shall control. Congress can not enforce either rule upon any State.' Hence it must follow that the Desert Land Act of 1877 did not, nor could it, abolish the common law of riparian rights in a State where that law had been adopted as at least one of the rules of law governing waters within its boundaries. The only effect that that Act had, or could have had, in regard to the subject under consideration, was to emphasize the right already granted under the Act of 1866 and as amended in 1870, to the effect that the surplus waters of the natural streams, or other sources of water supply, flowing over the public

lands might be taken under the doctrine of appropriation, as far as the rights of the Government as the owner thereof were concerned, for irrigation or other beneficial purposes."

VESTED RIGHTS DEFINED

A vested right is an immediate fixed right of present or future enjoyment. It is defined by the Supreme Court as follows:

Pearsall v. Great Northern R. Co., 161 U. S. 646-677; 16 Sup. Ct. 705; 40 L. Ed. 838.

(The quotation therefor being taken from 161 U. S. 673).

"A vested right is defined by Fearne, in his work upon Contingent Remainders, as 'an *immediate fixed right of present or future enjoyment;*' and by Chancellor Kent as an 'immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent, Com. 202. It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' Cooley, Const. L. 332."

Please also see the following references:

Crump v. Guyer et al, 157 Pac. 321, 322; (Supreme Court of Oklahoma. Feb. 29, 1916).

"'Rights are "vested" when the right of enjoyment, present of prospective, has become the

property of some particular person or persons as a present interest. *Trustees of Presbytery of Jersey City v. Trustees of First Presbyterian Church of Weehawken,* 80 N. J. Law, 572, 78 Atl. 207, 210.'

Again:

'A "vested right" may be considered as the power to do certain actions or to possess certain things lawfully. In its latter aspect it is substantially a right of property, and as such is protected by those provisions in the Constitution which apply to such rights.'

In

Gladney v. Synor, 172 Mo. 318, 72 S. W. 554, 60 L. R. A. 880, 95 Am. St. Rep. 517,

the court says:

'Vested rights may be created either by the common-law, by statute, or by contract, and it makes no difference as to the method of their creation; they are entitled to the same protection.' "

The decision then quotes Judge Story as follows:

" 'Judge Story in

Society v. Wheeler, 2 Gall. 105, Fed. Cas. No. 13, 156 says:

' * * * Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions of considerations already past, must be deemed retrospective;' * * *

We think the doctrine announced by Judge Story in *Society v. Wheeler, supra,* is sound, which is to the effect that upon principle every statute which takes away or impairs 'vested rights' acquired under existing laws, imposes a new duty, or attaches a new disability, must be deemed retrospective. * * * *

Not Lost by Nonuser.

'A failure to exercise a vested right before the passage of a subsequent statute which seeks to divest it in no wise affects or lessens that right.' *Trustees of Presbytery of Jersey City v. Trustees of First Presbyterian Church,* 80 N. J. Law, 572, 78 Atl. 207; *Graham v. Great Falls Water Power & Townsite Co.,* 30 Mont. 393, 76 Pac. 808; *Evans-Snider-Buel Co. v. McFadden,* 105 Fed. 293, 44 C. C. A. 494, 58, L. R. A. 900; *Downs v. Blount,* 170 Fed. 15, 95 C. C. A. 289, 31 L. R. A. (N.S.) 1076; *National Bank of Commerce v. Jones,* 18 Okl. 555, 91 Pac. 191, 12 L. R. A. (N.S.) 310, 11 Ann. Cas. 1041; *Lohrstorfer v. Lohrstorfer,* 140 Mich. 551, 104 N. W. 142, 70 L. R. A. 621; *Marshall et al v. M. E. and S. V. King et al.,* 24 Miss. 85."

We quote from Ruling Case Law, Volume 6, Sections 294, and 295 (page 308):

"294. Definition of Vested Rights.—The words 'vested rights' appear first to have been used in reference to real estate. This term is defined as 'an immediate fixed right of present or future enjoyment' and 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.' Rights are said to be vested in contra-distinction to their being contingent or expectant. A right is 'vested' when there is an ascertained person with a present right to present or future enjoyment; it is 'expectant' when it depends on the continuation of existing circumstances, such as the right of an heir to inherit, provided he survives his ancestor and the ancestor dies siezed and intestate; and finally a right is 'contingent' when it depends on the performance of some condition or the happening of some event before some other event or condition happens or is performed. As applied to the vested rights which are secured by constitutional guarantees from infringement or impairment except under special circumstances, the term

is not to be restricted to any narrow or technical meaning applicable to these words in the law of real property. The words are used as implying interests which it is proper for the state to recognize and protect, and of which the individual could not be deprived arbitrarily without injustice.

295. Nature and Origin of Vested Rights.—Vested rights may be created either by the common law, by statute, or by contract. No matter how created, they are entitled to the same protection. The *failure to exercise a vested right before the enactment of a subsequent statute which seeks to divest it in no way affects or lessens such right.* The vested right may arise in many different ways. For example, it may be one which has arisen by dedication, or by escheat, or it may be one in the nature of a mere easement."

LEGISLATIVE ACTS IMPAIRING VESTED RIGHTS—CONSTRUED AS PROSPECTIVE LAWS, NOT RETROACTIVE LAWS.

Sturges vs. Carter, 114 U. S., 511-523 (May, 1885), 5 Sup. Ct. 1014, 29 Law Ed. 240-244; Quotation from 114 U. S. at page 519.

"In the case of *The Society for Propogating the Gospel v. Wheeler,* 2 Gall. 139, Mr. Justice Story thus defines a retroactive, or, as he calls it, a retrospective law: 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, *must be deemed retrospective*'."

See also

Hoyt Metal Co. v. Atwood, 289 Fed. 453, 454-455 (Ill.) (February, 1923):

"(1) That an accrued right of action is a vested property right is well settled. *Norris v. Tripp,* 111

Iowa, 115, 82 N. W. 610; *Tufts v. Tufts,* 8 Utah, 142, 30 Pac. 309, 16 L. R. A. 482; *Pinkum v. City of Eau Claire,* 81 Wis. 301, 51 N. W. 550. Certainly a judgment is a vested property right. In 6 R. C. L., p. 319, we find the rule set forth correctly, we think:

> 'A judgment is such a vested right of property that the Legislature cannot by a retroactive law either destroy or diminish its value in any respect.' *Merchants' Bank v. Ballou,* 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715; *Strafford v. Sharon,* 61 Vt. 126, 17 Atl. 793, 18 Atl. 308, 4 L. R. A. 499; *Roche v. Waters,* 72 Md. 264, 19 Atl. 535, 72 L. R. A. 533.

(2) By a long line of decisions, courts have uniformly held that a statute is presumed to operate *prospectively* only, unless an intent to the contrary clearly appears, and this is especially applicable where the statute, if given a retroactive operation, would be invalid as impairing the obligation of contracts, or *interfering with vested rights.* Sutherland, Statutory Construction, Secs. 463, 464; *U. S. v. Jackson,* 143 Fed. 783, 75 C. C. A. 41; *Bauer Grocer Co. v. Zelle,* 172 Ill. 407, 50 N. E. 237; *Southwestern Coal Co. v. McBride,* 185 U. S. 499, 22 Sup. Ct. 763, 46 L. Ed. 1010; *U. S. v. United Shoe Machinery Co.* (D. C.) 264 Fed. 138."

See also

Favot vs. Kingsbury, (Cal.) 276 Pac. 1083, 1086, (April, 1929):

" The state has no power to divest or to impair vested rights whether such attempt be made by legislative enactment, by municipal ordinance, or by change in the Constitution of the state. 12 C. J. p. 956; *Estate of Wellings,* 1 Cal. 189, 240 P. 21; *Richmond Wharf & Dock Co. v. Blake,* 39 Cal. App. 1, 177 P. 508; *James vs. Oakland Traction Co.,* 10 Cal. App. 785, 103 P. 1082; 6 English and American Ency. p. 955."

See also

Travelers' Ins. Co. v. Ohler, (Neb.) 227 N. W. 449, 450. (November, 1929); From N. W. 450: "A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate *retrospectively* where it will have the effect to invalidate or impair the obligation of contracts or *interfere with vested rights.* 2 Lewis' Sutherland, Statutory Construction (2d Ed.) Sec. 642; *United States v. Jackson* (C. C. A.) 143 Fed. 783; *Hoyt Metal Co. vs. Atwood,* (C. C. A.) 289 F. 453; *Spitzer v. Healy,* 218 N. Y. 737, 113 N. E. 490."

Board of Sup'rs. of Arenac County v. Board of Sup'rs. of Iosco County, 122 N. W. 629-631. (Supreme Court of Michigan, Oct. 4, 1909).

Quotation from page 631:

"Those rights vested under Comp. Laws, Sec. 4424, and were not lost by the amendment of 1903, which should be held to be limited to cases arising thereafter.

(1) Under the rule that statutes will not be considered retroactive unless the intent that they should have retroactive effect clearly appears. *Price v. Hopkin,* 13 Mich. 318; *Smith v. Humphrey,* 20 Mich. 308; *Fuller v. Grand Rap.,* 40 Mich. 395; *Maxwell v. Bay City R. Co.,* 46 Mich. 278, 9 N. W. 410; *Phillips v. Buffalo Tp.,* 68 Mich. 217, 35 N. W. 918; *in re Lambrecht,* 137 Mich. 450, 100 N. W. 606; *Davis v. M. C. R. R. Co.,* 147 Mich. 479, 111 N. W. 76.

(2) It cannot be construed as retroactive to the detriment of vested rights. *Prane v. Reeder,* 21 Mich. 24, 4 Am. Rep. 430; *Van Fleet v. Van Fleet,* 49 Mich. 610, 14 N. W. 566; *Todd v. Elec. Com'rs.,* 104 Mich. 474, 62 N. W. 564, 64 N. W. 496, 29 L. R. A. 330; Cooley Con. Lim. (6th Ed.) p. 370; *Ludwig v. Stewart,* 32 Mich. 668; *Harrison v. Metz,* 17 Mich. 377; *McKisson v. Davenport,* 83 Mich. 211, 47 N. W. 100, 10 L. R. A. 507; *Atherton v. Bancroft,* 114 Mich. 241, 72 N. W. 208;

Angell v. W. Bay City, 117 Mich. 688, 76 N. W. 128; *Broffee v. Gd. Rap.,* 127 Mich. 92, 86 N. W. 401; *Heineman v. Schloss,* 83 Mich. 153, 47 N. W. 107; *Stitt v. Casterline,* 89 Mich. 239, 50 N. W. 847; *Finn v. Haynes,* 37 Mich. 63; *Danville Co. v. Ct. J.* 88 Mich. 244, 50 N. W. 40; *Philip v. Heraty,* 147 Mich. 473, 111 N. W. 93, 118 Am. St. Rep. 554; *Little v. Brousfield Co.,* 154 Mich. 369, 117 N. W. 963; Endlich on Statutes, Sec. 271; Potter's Dwarris on Stat. p. 163; *Boughner v. Bay City* (Mich.) 120 N. W. 597."

Crawford Co. v. Hathaway et al, 93 N. W., page 781. (Supreme Court of Nebraska. February 4, 1903).

Quotation from page 792:

"The irrigation act of 1889 abrogated in this state the common-law rule of riparian ownership in water, and substituted in lieu thereof the doctrine of prior appropriation. This legislation could not and did not have the effect of abolishing riparian rights which had already accrued, but only of preventing the acquisition of such rights in the future." * * * *

"The substitution of the law of prior appropriation, instead of the common-law rule of riparian ownership, is applicable only to those waters in the state which are unappropriated; or, in other words, *which have not become the property of riparian proprietors.*"

L. D. Lowe and Wife v. James Harris, L. R. A., Vol. 22, 379-390. (North Carolina Supreme Court. May 5, 1893).

Quotation from page 381:

"The legislature unquestionably had and has the power to modify or repeal the whole of the statute of frauds in so far as it applies to future contracts for the sale of land, but its authority to give the repealing statute a retroactive operation is as certainly restricted by the fundamental rule

that no law will be allowed to so operate as to disturb or destroy rights already vested. Did the legislature intend that the Act of 1891 (chap. 465) should be construed to operate retrospectively, and, if so, is the law, in so far as it relates to pre-existing rights, unconstitutional? *No law which divests property out of one person and vests it in another for his own private purposes without the consent of the owner, has ever been held a constitutional exercise of legislative power in any state of the Union. Cooley,* Const. Lim. 165; *Wilkinson v. Leland,* 27 U. S. 2 Pet. 658, 7 L. Ed. 553; *Satterlee v. Matthewson,* 27 U. S. 2 Pet. 380, 7 L. Ed. 458; *Hoke v. Henderson,* 15 N. C. 4, 25 Am. Dec. 677; *Wales v. Stetson,* 2 Mass. 143, 3 Am. Dec. 39; *Calder v. Bull,* 3 U. S. 3 Dall. 394, 1 L. Ed. 651; *Dash v. Van Kleeck,* 7 Johns. 507, 5 Am. Dec. 291; U. S. Const. art. 1, sec. 10; N. C. Const. art. 1, sec. 17; *Butler v. Pennsylvania,* 51 U. S. 10 How. 416, 13 L. Ed. 478; *Fletcher v. Peck,* 10 U. S. 6 Cranch, 137, 3 L. Ed. 178; *Stanmire v. Taylor,* 48 N. C. 207, 214; *King v. Hunter,* 65 N. C. 603, 6 Am. Rep. 754; *Wesson v. Johnson,* 66 N. C. 189; 1 Kent. Com. 455; *Stanmire v. Powell,* 35 N. C. 312.

Even in England, where there are no written constitutions, a statute will not commonly be construed to divest vested rights, and, when giving it a retrospective effect may lead to that result, *it is allowed to operate prospectively only. Moore v. Phillips* 7 Mees. & W. 536; *Couch v. Jeffries,* 4 Burr. 2462."

R. C. L., volume 6 at page 305, section 291, states:

"If a retrospective act which is neither an ex post facto law nor one impairing the obligation of a contract should nevertheless operate so as to take away a right of property, it may still be unconstitutional and void, not because it is retrospective, *but by reason of its repugnancy to constitutional provisions guaranteeing due process of law,* or for some other constitutional reason, as

for example, where it amounts to an improper assumption of judicial power by the legislature."

We quote the author further under section 293 (p. 307):

"Nevertheless statutes retrospective in their character and operation, directly affecting and divesting vested rights, are very generally considered as founded on unconstitutional principles, and consequently inoperative and void. Irrespective of any express prohibition as to the enactment of retrospective laws, and, in consequence, laws which retroactively divest vested rights, the broad proposition has been laid down that the legislature cannot impair or destroy vested property rights; and that even if a law is intended simply to change the remedy or procedure it is void if in fact it impairs vested rights."

WE BELIEVE IT TO BE THE DOCTRINE OF THIS COURT THAT A RIPARIAN RIGHT IS DETERMINED BY THE LAW AS IT WAS AT THE DATE OF THE ISSUANCE OF THE PATENT; THAT WHEN ONCE VESTED, THE OWNER CAN ONLY BE DEPRIVED THEREOF IN ACCORDANCE WITH ESTABLISHED LAW; THAT IF NECESSARY, IT CAN ONLY BE TAKEN FOR PUBLIC GOOD UPON DUE COMPENSATION.

Brewer-Elliott Oil & Gas Co. v. United States, 270 Fed. 100-110, (affirmed by this court, 260 U. S. 77-89, 43 Sup. Ct. 60, 67 L. Ed. 140-147). We quote first from 270 Fed. at 109.

"(5) It has never held its public lands in the territories under unnavigable waters under any such trust, but it has always had and exercised the absolute right to grant and dispose of such lands absolutely as appurtenant to and parts of the

property granted or conveyed by it to the riparian owners of the banks adjacent thereto *according to the existing law upon the subject of the rights of riparian owners at the times of the respective grants.* Such riparian grantees and owners under the acts of Congress and under the law applicable in 1838, 1872, and 1883 at the place where these leased premises lie became the owners of the beds of unnavigable streams to the respective threads thereof. R. S. Sec. 2476 (U. S. Comp. Stat. Sec. 4918); *Railroad Co. v. Schurmeier,* 7 Wall. 272, 287, 19 L. Ed. 74. Such a riparian right of the owner of the bank to the bed of the stream was a valuable one of which *'when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.' Yates v. Milwaukee,* 77 U. S. (10 Wall.) 497, 504."

This decision is to the effect that these rights are according to those existing *at the time of the grant from the government.*

This case was appealed to this court and is to be found in 260 U. S. 77-89, 43 Sup. Ct. 60, 67 Law Ed. 140-147, and we quote from 260 U. S. 88, 89.

"It is not for a state, by courts or legislature, in dealing with the general subject of beds of streams, to adopt a *retroactive* rule for determining navigability which would destroy a title already accrued under Federal law and grant, or would enlarge what actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked.

It is true that where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the Public Land Laws may be determined according to local rules; but this is subject to the qualification that the local

rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. Thus, the right of the riparian owner under such grant may be limited by the law of the state either to high or low-water mark, or extended to the middle of the stream. *Packer v. Bird,* 137 U. S. 661, 669, 34 L. Ed. 819, 820, 11 Sup. Ct. Rep. 210.

We said in *Oklahoma v. Texas,* decided May 1, 1922 (258 U. S. 574, 66 L. Ed. 771, 42 Sup. Ct. Rep. 406):

> 'Where the United States owns the bed of a non-navigable stream, and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If, by a treaty or statute or the terms of its patent, it has shown that it intended to resrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. When it is disposing of tribal land of the Indians under its guardianship, the same rule applies.'

(89) In government patents containing no words showing purpose to define riparian rights, the intention to abide the state law is inferred. Mr. Justice Bradley, speaking for the court in *Hardin v. Jordan,* 140 U. S. 371, 384, 35 L. Ed. 428, 434, 11 Sup. Ct. Rep. 808, said:

> 'In our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the *law of the state in which the lands lie*'."

RIPARIAN RIGHT IS A VESTED RIGHT WHICH CANNOT BE TAKEN EXCEPT UPON COMPENSATION PAID.

Thiesen v. Gulf, F. & A. R. Co., L. R. A. 1918 E., 718-738 (Fla.) (Decided November 3, 1917).

Quotation from page 738:

"Mr. Justice Miller in *Yates v. Milwaukee*, speaking for the Supreme Court of the United States, said: 'This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, *when once vested*, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation.'

See, also, *Potomac S. B. Co. v. Upper Potomac S. B. Co.*, 109 U. S. 672, 27 L. Ed. 1070, 3 Sup. Ct. Rep. 445, 4 Sup. Ct. Rep. 15; *Bell v. Gough*, 23 N. J. L. 624; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; Gould, Waters, Sec. 246.

Riparian rights, we think, are property and, being so, the right to take it for public use without compensation does not exist. The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability whether for residence or business purposes. The right of access to the property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many cases, doubtless, the riparian rights incident to the ownership of the land were the principal if not sole inducement leading to the purchase by one, and the reason for the price charged by the seller."

Crawford Company v. Leroy Hall, et al., 60 L. R. A. 889-910. (Neb. Supreme Court, Feb. 4, 1903).

Quotation from page 898:

"The riparian proprietor, say all the books and authorities, has a right to the flow of the water of the natural stream passing through or by his land; such right being inseparably annexed to the soil, and passing with it, not as an easement or appurtenance, but as a part and parcel of the land. This property right can be regarded only as a corporeal hereditament belonging to and incident to the soil, the same as though it were stones thereon, or grass, or trees springing from the earth. Gould, Waters, Sec. 204, and authorities there cited. The riparian right to the use of the water flowing in a natural water course is a property right, which should be regarded as such, and to protect which the owner may resort to any or all instrumentalities which may be employed for the protection of private property rights generally. *Gould v. Boston Duck Co.*, 13 Gray 442; *Ashley v. Pease*, 18 Pick 268; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Keeney & W. Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 582; *Beissell v. Sholl*, 4 Dall. 211, 1 L. Ed. 804. * * * *

It is also urged that, by virtue of the legislation enacted, the common-law rights belonging to riparian proprietors have been abolished. This position cannot be, we think, successfully maintained. The legislature has not, as we construe the several acts of that body relating to the subject, attempted to abolish the common-law rule defining existing rights of riparian proprietors, or to deprive them of such rights when once vested. On the contrary, such rights have been distinctly recognized. Nor is it believed that *an attempt to abrogate such rights could be construed as other than an unconstitutional exercise of legislative power, and therefore invalid.*"

Mansfield vs. Balliett, L. R. A. Book 58, 1903, 628-637. (Ohio Supreme Court, January 21, 1902).

Quotation from page 633:

"Authors who have fully investigated the subject are quite agreed in their conclusions that riparian rights are property rights, and therefore property, in the legal signification of the term, and within the meaning of the Constitution. In 1 Lewis, Em. Dom. Sec. 60, that author says that 'all the authorities agree' that small streams incapable of navigation 'are wholly private property, and that the title of the riparian owner extends to the middle of the stream.' And in Sec. 61 it is said that 'it may be laid down as a well-settled principle that every proprietor over or past whose land a stream of water flows has a right that it shall continue to flow to and from his premises in the quantity, quality, and manner in which it is accustomed to flow by nature, subject to the right of the upper proprietors to make a reasonable use of the stream as it flows past their land. *This right is a part of his property in the land, and* in many cases constitutes its most valuable element. *It necessarily follows, therefore, that any violation of this right* in the exercise of the power of eminent domain *is a taking of private property* for which compensation must be made'."

Martha Lake Water Co., No. 1 v. Nelson et al., 277 Pac., 382. (Supreme Court of Washington, May 2, 1929):

"The constitution of this state (section 16 of article 1) provides that: 'No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner.' * * *

In the present case the lowering of the waters of Martha Lake would materially and substantially damage the riparian owners. The water's edge would recede and land which was covered with water at the time of their purchase would become dry land. Under the constitutional provision cited, before their land can be thus damaged they are entitled to compensation."

Lux vs. Haggin, 69 Cal. 255, 10 Pac. 674. (Apr. 26th, 1886).

We quote from the Pacific, Volume 10, pages 753-4. For the sake of brevity we only make the following excerpts:

"But the right to a water-course begins *ex jure naturae,* and, having taken a certain course naturally, it cannot be diverted to the deprivation of the rights of the riparian owners below. So say all the common-law text-books, and the decisions. * * * *

The right to the flow of the water is inseparably annexed to the soil, and passes with it, not as an easement or appurtenant, but as a parcel. Use does not create, and disuse cannot destroy or suspend it. Each person through whose land a water-course flows has (in common with those in like situation) an equal right to the benefit of it as it passes through his land, for all useful purposes to which it may be applied; and no proprietor of land on the same water-course has a right unreasonably to divert it from flowing into his premises, or to obstruct it in passing from them, or to corrupt or destroy it. Chief Justice Shaw in *Johnson v. Jordan,* 2 Metc. 239. The right to the use of water flowing over land is undoubtedly identified with the realty, and is a real and corporeal hereditament. *Cary v. Daniels,* 5 Metc. 238. Prima facie every proprietor on each bank of a river is entitled to the land covered by the water to the middle thread of the river, and has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. Priority of occupancy of the flowing waters of a river creates no right, unless the apporpriation be for a period which the law deems a presumption of right." * *

"It has always been held that a grant of land carries with it the water flowing over the soil." * *

"By settled principles of both the civil and common law, the riparian owner has a usufruct in the stream as it passes over his land, of which he cannot be deprived by mere diversion. *Pope v. Kin-*

man, 54 Cal. 3. The right of a riparian proprietor to have the water of a stream run through his land *IS A VESTED RIGHT* and an interference with it imports damages."

We quote from

Wiel, Water Rights in the Western States, 2nd Edition, Section 56, page 115,

which cites the Lux case:

"§ 56. Prior Settlers Who Hold the Land In Fee.—All land that has passed into private ownership in fee simple is fully within this rule, and protected in its riparian rights against subsequent appropriators, though the appropriator goes on vacant public land to make his appropriation. (Citing Lux vs. Haggin). Usually the land passes into private ownership by virtue of a patent under the homestead, pre-emption, or other Federal laws. But the fee may have been acquired by virtue of a Mexican grant, made before the United States acquired sovereignty; and riparian rights (in jurisdictions recognizing riparian rights) fully attach to the land whose title is deraigned under a Mexican grant. Of course, the California rule does not apply in jurisdictions where riparian rights are rejected in toto."

THE NATURE OF AN APPROPRIATION. IT TAKES NOTHING AWAY FROM ANYONE. IT APPROPRIATES WHAT MAY BE TAKEN LEGALLY.

Rindge v. Crags Land Co., et al, 205 Pac. 36-39, (District Court of Appeal, California, Jan. 24, 1922).

Quotation from page 38-39:

"(4-8). It is established in California that a person may be possessed of rights as to the use of

the waters in a stream both because of the riparian character of the land owned by him and also as an appropriator. *An appropriator can gain nothing as against riparian rights which have attached,* and, once such rights have become affixed, they continue and are not lost, regardless of whether the water has been put to any beneficial use upon the land; the right is one continually and perpetually appurtenant." * * * *

"'*An appropriation does not of itself deprive any private person of his rights; it merely vests in the appropriator such rights as have not previously become vested in private ownership, either by virtue of some riparian right or because of prior statutory or common-law appropriation and use.* It affects and divests the riparian rights otherwise attaching to public lands of the United States, solely because the act of Congress declares that grants of public lands shall be made subject to all water rights that may have previously accrued to any person other than the grantee. An appropriation of water and use thereunder does not become effective to divest private rights in a stream, unless it has been continued adversely thereto for the period of five years under such circumstances as to gain a title by prescription, and then, only to the extent of the use.' *Duckworth v. Watsonville, etc.,* 150 Cal. 520, 89 Pac. 338."

THE ADJUDICATION OF THE WATERS OF ROGUE RIVER UNDER THE 1909 CODE NOT BINDING UPON PETITIONER.

The decree therein is Defendant's (Petitioner's) Exhibit "O," a printed pamphlet, containing a certified copy of that decree.

The owner of petitioner's lands was not served with process in that case. And under the Water Code, as construed In Re Willow Creek, 47 Ore., at 617-8 (cited

in the main brief), the decree is binding upon only those who were served according to statute. Any claimant who fails to submit his proof is barred by statute, but only if he has been served with process.

The decree was not pled nor offered as an estoppel. (Answer R. 20-38). There was a reference to the decree at R. 33, paragraph XI of the Answer, which alleges that the McClure 75 second foot right was adjudicated in that decree; and at R. 34, in the same paragraph, it is stated that the 220 second-feet adjudicated to the Oregon Water and Power Company by its said adjudication was conveyed to the City. But the ownership of these two rights by the respondents is conceded, as they were both initiated prior to the patenting of petitioner's land.

We quote from Defendant's (Respondent's) Exhibit "O," the so-called Adjudication Decree, paragraph IV thereof, at page 295-6 of the Record.

> "That the following named person, firms, associations, and corporations, *although duly and regularly notified as required by law of the commencement of these proceedings and although afforded opportunity to present their respective claims,* and to be heard herein, have failed and neglected to appear in these proceedings, or to submit or offer any proof herein of any right, title, interest, or claim thereto, in or to the use of, or the waters, or flow of the waters of said Rogue River or any tributary thereof involved in these proceedings; that the said persons, firms and corporations hereinafter named being in default herein, as more fully appears from the findings of fact of the State Water Board

herein, are hereby declared to be in default, and are *not entitled to any right, title, or interest* in or to the waters involved in these proceedings, nor any part thereof, *nor to any riparian rights,* rights by appropriation or prescription, or otherwise in respect to the diversion or use of said waters or any thereof, or to appear herein and subsequenly hereto assert any right, claim to, or interest in, said waters, or any of them, acquired, initiated or owned by them at or prior to the time of the commencement of these proceedings; and each of said persons, firms and corporations shall be, and hereby is, forever barred and estopped from hereafter asserting any rights heretofore acquired upon said Rogue River or any of its tributaries embraced within these proceedings, and shall be held, and hereby is declared, to have forfeited all rights to use of the waters herein involved, if any he had prior hereto, theretofore claimed by him; the persons, firms and corporations so being in default herein being as follows, to-wit:" (Following the words "to-wit:" is a long list of names of persons, companies and corporations, alphabetically arranged. The names of the following companies or corporations do not appear in the said list of *parties served and against whom default was entered as stated in said paragraph IV*):

Prospect Construction Company.
Rogue River Electric Company.
Siskiyou Light and Power Company.
Condor Water and Power Company.
California-Oregon Power Company.
The California Oregon Power Company,
plaintiff."

We call the court's attention to the statement at the foot of the language quoted from the Decree to the effect that following the end of the paragraph is the agreed statement in the record to the effect that there

follows a long list of persons, firms and corporations alphabetically arranged, and that the names of the following companies, etc., "do not appear in said list of parties served and against whom default was entered as stated in paragraph IV." (of Ex. "O"). Then follows a list of six companies mentioned which are all that have been listed in the testimony as predecessors in interest of the appellant, either in the utility business, or in the ownership of its property involved here.

The decree was not pleaded as an estoppel, nor otherwise.

THE DECREE, ACCORDING TO THE EVIDENCE, WOULD AT PETITIONER'S LOT 2 AND AT THE SOUTHERN PORTION OF PETITIONER'S LOT 1, MOVE THE THREAD OF THE STREAM WESTWARD FROM 100 TO 150 FEET (RECORD QUOTED AT PAGE 136 OF THIS APPENDIX).

Authorities cited below show that this sudden change will result in our boundary remaining where it was prior to the change in the river bed, because the thread of the river will change suddenly. The majority opinion herein was to the effect that this was no violation of petitioner's rights.

OREGON AUTHORITY ON BOUNDARY

We quote from the Supreme Court of Oregon in *Miscelli v. Andrus*, 61 Or. 78, 85, (120 Pac. 737), (1912).

"The United States originally owned the bed of each unnavigable river, and when any land bordering thereon is granted by the general government or its successors in title, by describing a border line as running to a bank of the stream and thence with its meanders, giving them, the *boundary* of the premises conveyed, unless restricted by express words, extends by the overwhelming preponderance of judicial utterance to the center of the river. 4 Am. & Eng. Ency. Law (2 ed.) 828; *Angell, Water Courses* (6 ed.) Sec. 29, note 1; 5 Cyc. 897; 2 *Farnham, Waters and Water Rights,* p. 1154; *Goff v. Cougle,* 118 Mich. 307 (76 N. W. 489; 42 L. R. A. 161) and notes. * *

Page 86:

A text-writer, in discussing the location of borders of land, says: 'If an unnavigable stream, in which the title of the riparian owner extends *ad filum aquae,* slowly and imperceptibly changes its course, the boundary line is the center of the new channel.' *Gould, Waters* (3 ed.) Sec. 159. This rule was followed in *Nebraska v. Iowa,* 143 U. S. 359 (12 Sup. Ct. 396; 36 L. Ed. 186), where the new channel instead of the middle of the stream was adopted as the limit of ownership."

However, such decisions do not change the facts. The stream and the bed thereof continue to remain alike the property of both, and although the actual ownership, so-called, may stop with the thread of the stream, which is the boundary for computing acreage, *nevertheless, the stream-bed remains the common highway of the respective owners for the conveyance of the waters to and upon the lands of the respective riparian proprietors as it was wont to do in a state of nature.*

The meander line is placed for the purpose of computing the acreage within the boudaries. But where the change of the thread of the stream is sudden or violent as would be the case here, the boundary remains the same. That is, *at the same place where the thread of the stream was as it was originally surveyed.* In support of this position, we cite the Supreme Court of Oregon:

Wykoff et al., v. Mayfield, 130 Oregon 687, (280 Pacific 340). (1929).

Page 690:

"The meander line is placed for the purpose of computing the acreage within the boundaries. The stream is the real boundary, not the meander line, whether the course is described as extending to the bank of the stream, or to the stream itself: 9 C. J. 189, Sec. 69; *Miscelli v. Andrus* (above), *Nebraska v. Iowa,* 143 U. S. 359 (36 L. Ed. 186, 12 Sup. Ct. Rep. 396)."

Page 690:

"Addition to land by accretion or loss by avulsion causes the boundary to change with the change in the thread of the stream, but where the change is *sudden* and *violent,* the boundary remains the same, that is, the thread of the stream as it was as originally surveyed: *Philadelphia Co. v. Stimson,* 223 U. S. 524, 605 (56 L. Ed. 570, 32 Sup. Ct. Rep. 340)."

THE DESERT LAND ACT

This is the Act of March 3rd, 1877, Title 43, United States Code Annotated, set forth in Sections 321, 322, 323 and 324.

"Section 321. Entry right generally; extent of right to appropriate waters. It shall be lawful for

any citizen of the United States, or any person of requisite age, 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of 25 cents per acre—to file a declaration under oath with the register and the receiver* of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter; provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated; and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, *shall remain and be held free* for the appropriation and use of the public for irrigation, mining and manufacturing purposes *subject to existing rights.* Said declaration shall describe particularly said one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him: Provided, That no person shall be permitted to enter more than one tract of land and not to exceed three hundred and twenty acres which shall be in compact form. (Mar. 3, 1877, c. 107, Sec. 1, 19 Stat. 377; Mar. 3, 1891, c. 561, Sec. 2, 26 Stat. 1096).

Section 322. Desert Lands defined; question how determined. All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this chapter, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

The *determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.* (Mar. 3, 1877, c. 107, Section 2, 3, 19 Stat. 377).

Section 323. States in which chapter applies. This chapter shall only apply to and take effect in the States of California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota. (March 3, 1877, c. 107, Sec. 3,* 19 Stat. 377; Mar. 3, 1891, c. 561, Sec. 2, 26 Stat. 1096).

Section 324. Assignment of entries. No assignment after March 28, 1908, of an entry made under this chapter shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under this chapter of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized. (Mar. 28, 1908, c. 112, Sec. 2, 35 Stat. 52)."

In addition to *Kansas vs. Colorado,* supra, on the right of the state to determine for itself whether it will adopt the riparian doctrine, or the doctrine of appropriation, and in addition to *Sturr vs. Beck,* we submit that

PETITIONER IS ENTITLED TO HAVE THIS FEDERAL STATUTE CONSTRUED BY A FEDERAL COURT, AND TO HAVE ITS CONTROVERSIES DETERMINED BY THIS INDEPENDENT TRIBUNAL.

States Working Out Their Own Systems.

United States v. Central Stockholders Corporation, 51 F. (2d) 322-339, 329. (1931).

"In view of the long acquiescence of the federal government in the use of waters arising on or flowing through public lands it would seem that special legislation was to be reasonably expected as a basis for the litigation of its rights thereto. Without again citing specific statutes or decisions, a general view of the decisions, and of the federal legislation, leads to the conclusion that it has been the consistent policy of the government of the United States *to allow the citizens of the various states to work out their own system of law with relation to water rights without intervention or adverse legislation by the federal government.* Not only has this been the policy of the government, but appellees contend it is settled law that the government of the United States in its proprietary relationship growing out of the ownership of public lands is subordinate to and controlled by state legislation and decision upon that subject."

Burgess v. Seligman, 107 U. S. (17 Otto) 20-38, 27 L. Ed. 359, 365. (Decided Jan. 29, 1883):

Quotation from page 365 of 27 L. Ed:

"As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exer-

cise an independent judgment in cases not foreclosed by previous adjudication."

Courts of the United States must

proceed to judgment and afford redress in every case where they have jurisdiction. They cannot abdicate the authority or duty in any case in favor of another jurisdiction.

See also:

Chicot County v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. Ed. 546. (Decided April 3, 1893).

We quote from 148 U. S. page 534:

"In *Hyde v. Stone,* 61 U. S. 20 How. 170, 175 (15:874, 875), it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam v. Broadnax,* 39 U. S. 14 Pet. 67 (10:357); *Union Bank of Tennessee v. Vaiden,* 59 U. S. 18 How. 503 (15:472).' This principle has been steadily adhered to by this court."

Pease v. Peck, 59 U. S. 595, 18 How. 595-601, 15 Law Ed. 518, 520. (May 14, 1856).

"In all cases where there is a settled construc-

tion of the laws of a state, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. But when this court have first decided a question arising under state laws, we do not feel bound to surrender our convictions, on account of a contrary subsequent decision of a state court, as in the case of *Rowan v. Runnels*, 5 How., 139. When the decisions of the state court are *not consistent* we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist, also, when a cause is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a circuit court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a state.

Parties who, by the Constitution and laws of the United States, *have a right to have their controversies* decided in their tribunals, *have a right* to demand the *unbiased judgment of the court.*"

LEGISLATIVE ENCROACHMENT UPON THE JUDICIARY

The provision of Subdivision 2 of Section 70, (Appx. 1) of the Water Code, defining a vested riparian right, as construed In Re Hood River, amounts to a declaration by the Legislature of what the law was at the time of the enactment. This is a judicial question. The riparian right came through the consti-

tutional adoption of the common law, as applied and construed by the Oregon Court prior to the enactment of the Code. Such a definition is an invasion of the powers of the judiciary, and will be disregarded by the courts.

We cite:

Macartney v. Shiperd, 60 Ore. 133-143, (117 Pac. 814) (1911).

Quotation from 60 Ore., page 141-3:

"Bearing in mind that this was an action upon a contract, it is a rule of property that the laws relating to the enforcement of contracts are to be deemed a part of the agreement so that, when a judgment is rendered upon such contract, the rights of the parties after the time for appeal has elapsed become fixed and vested, and the legislature cannot, by any subsequent act, change those rights under such judgment. That the legislative assembly cannot interfere with vested rights is the doctrine laid down in Noon's Estate, 49 Or. 286 (88 Pac. 673: 90 Pac. 673). In that case, as the law stood at the death of the testator, the real property descended to the next of kin, and for the purpose of paying the debts of an estate personal property was required to be sold first and afterwards real property, if necessary. Pending the settlement of Noon's estate, the legislature amended the law in that respect so that it rested in the discretion of the county court to order a sale of the real property for the satisfaction of claims before looking to personal property for the payment of a decedent's debts. But this court held, in substance, that the rights of the heirs to the real property of their ancestor attached and became vested in the real property at his death, and that subsequent legislation could not interfere with those rights. Analogous to this is the doctrine laid down by this court in *Martin v. White,* 53 Or. 319 (100 Pac. 290), wherein it is stated that, 'when one has a mere right of action, the legislature may unquestionably pre-

scribe a reasonable time in which he may proceed; but, in case he has both title and possession and the legislature attempts to create the necessity for suit by converting an estate in possession into a mere right of action and then limit the time in which the action may be brought, it is exceeding its power.' So, here, when a judgment was rendered in this action and the time for appeal therefrom had elapsed, the right of the successful party to enjoy the fruits of his judgment became immovably established and the legislative assembly had no right afterwards to interfere, even tentatively, with that vested right, yet that is what it proposed by trying to validate attempted appeals. *Burch v. Newberry,* 10 N. Y. 374; *Germania Savings Bank v. Village of Suspension Bridge,* 159 N. Y. 362 (54 N. E. 33); *Livingston v. Livingston,* 173 N. Y. 377 (66 N. E. 123; 61 L. R. A. 800; 93 Am. St. Rep. 600); In *Re Green,* 166 N. Y. 485 (60 N. E. 183); *Ratcliffe v. Anderson,* 31 Grat. (Va.) 105 (31 Am. Rep. 716); *Edwards v. Kearzey,* 96 U. S. 595 (24 L. Ed. 793); *Barnitz v. Beverley,* 163 U. S. 118 (16 Sup. Ct. 1042; 41 L. Ed. 93); *Anderson v. Hygeia Hotel Co.,* 92 Va. 687 (24 S. E. 269); *Bettman v. Cowley,* 19 Wash. 207 (53 Pac. 53; 40 L. R. A. 815); *Humphrey v. Gerard,* 83 Conn. 346 (77 Atl. 65); In re *Handley's Estate,* 15 Utah 212, (49 Pac. 829; 62 Am. St. Rep. 926); *Village of New Holland v. Holland,* 99 Ill., App. 251.

5. Again, the Constitution of this State (Article 3, Section 1) provides that 'the powers of government shall be divided into three separate departments: The legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided.' In *Griffin v. Cunningham,* 20 Grat. (Va.) 31, the Supreme Court of Virginia quotes with approval the language of Judge Cooley as follows:

'To declare what the law is or has been is judicial power; to declare what the law shall be is legislative.'

In *Thomas v. Portland,* 40 Or. 50 (66 Pac. 439), Judge Wolverton uses this language:

'A statute which operates to annul or set aside the final judgment of a court of competent jurisdiction and to disturb or defeat rights thus vested is inoperative and void. By reason of the distribution of powers under the Constitution assigning to the legislature and the judiciary each its separate and distinct functions, one department is not permitted to trench upon the functions and powers of the other.'

The act in question does not profess to give to litigants any new right of appeal. It recites that there is doubt about the construction of the acts of the legislative assembly that have been already passed relating to appeals, and, based upon that alleged doubt, it proceeds to construe those previous enactments and to declare their meaning validating appeals, notices of which had been theretofore served. This is plainly an invasion of the judicial power by the legislative assembly, and is not admissible: *Sanders v. Cabaniss,* 43 Ala. 173; In re Boyett, 136 N. C. 415 (48 S. E. 789: 67 L. R. A. 972; 103 Am. St. Rep. 944); *Lindsay v. United States Savings & Loan Company,* 120 Ala. 156 (24 South. 171: 42 L. R. A. 783).

The statute in question does not operate to extend the period for taking an appeal, or to include as an appealable order the action of the court in denying a motion for a new trial."

The foregoing case was followed and cited in an opinion of the Oregon Supreme Court, of February 16, 1933, in

Roles Shingle Co. v. Bergerson et al, 142 Ore., 131 (19 P. (2d) 94) (1933).

See also:

Cooley's Constitutional Limitations, 7th Edition, pages 134-5-6-7,

from which quotation is made in the main brief.

INJUNCTION RELIEF

In addition to the authorities cited or referred to in the body of the brief, we submit the following:

Phipps v. Rogue River Valley Canal Co., 80 Ore. 175, 181; 156 Pac. 794, (1916):

"The infliction of 'irreparable injury,' such as a court of equity will enjoin, includes also that degree of wrongs of a repeated or continuing kind which produce hurt, inconvenience or damage that can be estimated only by conjection, and not by any accurate standard of measurement: 29 Cyc. 1224; *Bernard v. Willamette Box & L. Co.,* 64 Or. 225, 129 Pac. 1039)."

See also

Gould v. Eaton, (Cal.) 49 Pac. 577-8; 38 L. R. A. 181, 183:

"The plaintiff's right to an injunction does not depend upon the amount of injury which he has received. Being a riparian owner, he has a right to the flow of the entire stream, as against any diminution thereof by one who is not a riparian owner, and the *claim of the defendants that they have a right to divert a portion of its flow authorizes him to invoke the aid of equity in order that this claim may not ripen into a right. Moore v. Clear Lake Waterworks,* 68 Cal. 146; *Stanford v. Felt,* 71 Cal. 249; *Swindon Waterworks Co. v. Proprietors of Wilts & B. Canal Nav. Co., L. R.* 7 H. L. 705."

Farnham, Waters and Water Rights, Vol. II, page 1722, Section 530: We quote from the section:

"530. Changing current.—The action of running

water is such as to wear away the banks against which the current is directed, and therefore one riparian owner has no right to change the flow of the current so as to direct it against the land of the opposite owner. In the important case of *Bickett v. Morris,* the court held that a riparian proprietor has no right to erect a building in the alveus of a stream without the consent of the opposite proprietor, and the opposite proprietor may compel him to suspend such operation without proving that any damages were actually sustained by him by the erection, unless the encroachment is so slight and trivial as not to involve any risk of future injury. The extent and limitation of this doctrine were fixed in *Belfast Rope Works Co. v. Boyd,* where it was held that the construction of a weir in a stream so as to interfere with the flow of the water was actionable. The court adopted the language of Lord Blackburn in *Ewing v. Colquhoun,* in which he explained *Bickett v. Morris* as holding that where an erection is a present, sensible injuria to the proprietary right of the owner of the other part of the alveus, or of the opposite bank of a running stream, he may have it removed, on the ground that there is a present injury to the right of property if it is impossible to predict that it may not produce serious damage in future, though the complaining party is not in a position to qualify present damage."

Farnham further says on page 1771:

"551. No injury need be shown.—Some of the earlier cases, which were decided upon the ground that priority of use was the basis of rights in a flowing stream, seem to indicate that, in order to give the upper owner a right of action, he must show that he has been injured. But it has become settled that the right to the natural flow of the stream is a natural right, given by nature, and that it depends solely on ownership of the banks of the stream, regardless of whether any use has been

made of it or not. The conclusion must necessarily follow that an interference with this right will entitle the riparian owner to redress, whether he can show any actual injury or not. Injury is shown as soon as it appears that the water is backed over the line."

The Oregon Supreme Court in 1901 followed the doctrine that the riparian owner has the right to protect the banks and maintain the stream in its natural channel, quoting from Long on Irrigation in the following case:

Cox v. Bernard, 39 Or. 53-63, (64 Pac. 860). (Decided May 4, 1901).

Quotation from pages 60-61:

"Mr. Long, in his work on Irrigation (section 9), commenting upon like conditions, says: 'Every proprietor of lands on the banks of a natural stream has an equal right to have the water of the stream to continue to flow in its natural course as it was wont to run, without dimunition in as either of these conditions may result from the reasonable use of the water for irrigation or other lawful purposes by upper proprietors.' It is thus made apparent that the plaintiffs are entitled to have the water of Cottonwood Creek come down to them, undiminished in quantity and unimpaired in quality, except so far as may result from reasonable use by upper riparian proprietors; *and, to the end that they may insure it coming down, they assuredly have the right, when they can not be regarded as tresspassers, to maintain the banks of the stream in their accustomed and natural condition, so that the water may not be diverted or carried off by reason of washouts, rents, or crevasses therein.* The rule is well established that a riparian proprietor may protect his premises against overflow of the stream: *Pierce*

v. Kinney, 59 Barb. 56. And it is reasonable that he may also protect the banks, and thereby secure the use of the water which would naturally flow within them."

Rigney vs. Tacoma Light and Water Co., 9 Wash. 576, (38 Pac. 147).

Quotation from page 149 of 38 Pac.:

"The right of the riparian proprietor to the flow of the water is inseparably annexed to the soil and passes with it not as a mere easement or appurtenant, but as a part and parcel of it. Use does not create, and disuse cannot destroy or suspend it. *Johnson v. Jordan,* 2 Metc. (Mass.) 239; *Lux v. Haggin, supra.* The riparian proprietor has no property in the water itself but a simple *usufruct* while it passes along. 1 Wood, Nuis. (3d Ed.) p. 471. The right to the use of water flowing over land is identified with the realty, and is a real and corporeal hereditament. *Cary v. Daniels,* 5 Metc. (Mass.) 238. And this right is a substantial one, and may be the subject of sale or lease, like the land itself. 1 Wood, Nuis. (2d Ed.) p. 412. The respondent, having this clear legal right to the natural flow of the waters of Clover Creek over his lands, cannot be unwillingly deprived of it without compensation or due process of law, even by the public, or for a public use, without disregarding the fundamental law of this state. Even if his damages were shown to be slight, or merely nominal (which is not shown), the right still exists, and cannot be violated with impunity. Actual damage is not indispensable as the foundation of an action. *It is sufficient to show a violation of a right. The law will then presume some damage."*

THE CEMENT COMPANY IS THE PARTY IN INTEREST.

As between respondents, the cement company is the party in interest. Exhibit A to respondents' (R. 38) is

the contract, of date October 19, 1926, under which the city sold to the cement company respondents' lands and water rights involved herein. Petitioner called Mr. Muirhead, vice president and in charge of the cement company's operations involved herein, and his testimony upon that subject is as follows:

> "Witness testified that the copy of the contract dated in October, 1926, and set up in defendant's answer is the contract between the defendants and was in force at the time witness was testifying, that there had been no extension of it but one would soon be necessary; that the company had paid the city upon it a $100.00 a month, amounting to $5,600.00. (104-15)." (R. 125).

The trial of this cause was begun on the 23rd day of April, 1931, (R. 106) and the foregoing testimony was given at that session, and shortly after that date. So, on the basis of the monthly payments required under the contract, the amount now paid on the purchase price is more than ten thousand dollars of the $22,500.00 total. The relation of the respondents to each other, under that state of facts, is shown by the following cases from the Oregon Supreme Court, to wit:

In

> *Sievers v. Brown,* 34 Oregon 454, 456, (56 Pac. 171), (1899),

the Court said:

> "1. A bond for a deed transfers to the obligee an equitable interest in the premises agreed to be conveyed, which is measured by the amount paid on account of the purchase. The legal title remains in

> the obligor, in trust for the purchaser, who, upon payment of the entire consideration, acquires the whole equitable interest, and may maintain a suit to compel the specific performance of the contract, if the obligor refuse to keep his covenants."

And in

> *Quillen v. Schimpf,* 133 Or. 581, 587 (291 Pac. 1009), (1930),

the Court said:

> "In *Burkhard v. Howard,* 14 Or. 39 (12 p. 79), it was held that the effect of a bond for a deed is to transfer the equitable title in the land to the vendee, and that the vendor holds the legal title merely as security for the sum named therein. See also, *Sayre v. Mohney,* 30 Or. 238 (47 P. 197)."

Hence, the city holds the legal title in trust for the cement company, which, upon payment of the entire consideration, will become entitled to the deed.

MATERIAL FACTS.

We set forth the facts showing the necessity for the issuance of the injunction for the preservation of petitioner's rights. These describe the dynamiting of the river bed adjoining the riparian lands of the respective parties situated upon either side of the stream. They show the intention of the Cement Company in the dynamiting of the river bed, and the effect thereof; that the excavation of the rock shattered by the dynamiting, and the lowering of the Cement Company's canal connecting with the excavation that would be made in the river bed by the removal of said rock, would suck all of the water of the river from petition-

er's land and render it worthless; that the land has a value of $30,000.00 for power purposes, and that the petitioner needs it for the purpose of erecting thereon what is called a "stand-by" plant for the generation of electricity for sale and distribution; the necessity for such a stand-by plant to be built near the point of distribution of the current; that the Cement Company intended to use practically all of the water of the river for the manufacture of electricity for its own uses, and also for sale. They show these and other facts making evident the necessity for petitioner to ask the protection of the courts of equity against the destruction of its property.

THE DYNAMITING OF THE RIVER BED

It is alleged in the bill of complaint (R. 11) paragraph XI, and admitted in the answer thereto (R. 24) paragraph XII, that on the evening of July 21st, 1930, the cement company, without the knowledge or consent of the petitioner, exploded large quantities of dynamite in the bed of Rogue River at the point in controversy, and which explosion shattered and broke the rock bed of the river for a distance up and down the river of approximately one hundred feet, by from twenty-seven to fifty feet in width; that the dynamite had been inserted in holes which had been drilled in the rock bed of the river at said point and below the bed of the stream, and that the cement company intended to forthwith remove the rock shattered by the

explosion.

The intention of the cement company was to thereby deepen the channel of the river on its side of the thread of the stream to such an extent that the excavation would be sufficient to take 1347 cubic feet per second of the waters of the stream, which is more than twice the flow of the stream at low water.

It will appear from the evidence cited below that at the lower end of this deep channel so to be made, the cement company was lowering the bed of its canal to carry that water into its proposed power plant at or near the site of the little city plant of the respondent, Gold Hill, which the cement company had acquired through its contract of purchase.

Plaintiff's (Petitioner's) Exhibit 4—Photo.

Plaintiff's (petitioner's) Exhibit 4, (R. 119) is from a photograph taken by the cement company just prior to the explosion of the dynamite. A copy thereof is inserted in this brief, and indexed herein.

Mr. Muirhead, respondent's vice president in charge of operations, testified as to Exhibit 4; that the rock bottom had been drilled, and pegs inserted therein, which pegs show in Exhibit 4. The condensed statement of his testimony, taken from the record, is as follows:

> "Mr. Muirhead testified that Exhibit 4 was taken a couple of days before the blasting ocurred that it shows 220 holes from which wooden pegs protrude, these being the holes drilled to receive

the dynamite. The witness pointed out the pegs in the picture showing the location of the holes." (R. 118).

Mr. Muirhead described the drilling, etc., in the following statement:

"The witness stated that the pegs marked '1' on Exhibit 4 are the type of pegs that were driven into holes that were drilled into the rock, that some of them are deeper in the holes, but they can be seen; that the holes were drilled with fairly uniform spacing throughout the area; that the entire area to be blasted was drilled at regular intervals, so that the blast would clean it out as clean as possible, and leave no more ridges or crevices than could be helped; that some of the holes were drilled in the water between the ledges of rock; that in proportion to the area involved there (102-13) were as many holes in between as there are shown on the rock; That is—as many under the water as on the rock; that they are shown in such places as he then designated on the exhibit by an arrow pointing to them with the number '1' in the area. Some holes were as much as three feet under the water and hence do not show in the photograph. That at first they had intended to excavate so as to get a greater capacity than they were getting by the present blasting. But now, being only allowed to go to the thread of the stream, there was not the necessity for having such a large area as previously existed and since the holes were already drilled, the company only shot the one that it needed to make the area required, being those adjacent to the channels, *because it would take less powder and make less rock to be removed, the powder and the removal being expensive* * * * * * that they endeavored to follow the channels with the blasting *so as to keep the rock that would have to be hauled away to a minimum,* using the natural channel." (R. 121-122).

Plaintiff's (Petitioner's) Exhibit 5—Photo.

Plaintiff's (petitioner's) Exhibit 5, (R. 123) is from a photograph taken by the cement company of the portion of the river bed, immediately after it had been shattered by the explosion of the dynamite. The record shows that Exhibit 5 was taken three days after the explosion, and covered the same area as shown by Exhibit 4. (R. 122).

Witness Muirhead testified:

> "The witness stated that the two photographs, Exhibits 4 and 5, represent the condition before and the condition following the blasting. (Tr. 30). That the date of the taking of the picture is on each exhibit, Exhibit 4, July 13, 1930, Exhibit 5, July 24, 1930, and that the explosion occurred on the 21st of July." (R. 125).

A comparison of Exhibit 4 with Exhibit 5 will show the effects of the tremendous explosion that was made. And it becomes interesting to know the real reason why this should be done.

Some months prior to the explosion, a former case between the same parties, involving the same property rights, was terminated in the Court of Appeals, and the opinion in that case is to be found in 35 Fed. 2d, 317. (1929).

Based upon the mandate issued out of the Court of Appeals, in said prior cause, there was entered in the District Court, on the 20th day of December, 1929, in said suit No. E-8991, a modified decree, (R. 172-9). The said explosion occurred in the July following the

December in which said decree was entered, and while the determination of the question involved was unsettled.

Dates of Drilling.

The drilling was done while that former case was pending, and about ten days before its decision.

Mr. Muirhead, of the cement company, testified concerning the drilling, as follows:

> "He stated that the drilling preparatory to the explosions was begun October 16, 1928, and completed November 20, 1928; that the drilling was finished about ten days before the decision in a prior case pending; he testified that he was in charge of the explosions, the operation at the time that the explosion was made and had charge of it personally." (R. 324-5).

THE PURPOSE OF THE EXPLOSION

The condensed statement of the evidence shows the following from the testimony of Mr. Muirhead, in charge of the cement company's operations:

> " 'It is our intention to shoot a stretch through there approximately thirty feet wide and five feet deep below the water stage at the date of our engineer's estimate, the original estimate which was 1069.40.' That his engineer could testify more accurately, but that it was apporximately an area thirty feet wide and five feet deep and as long as was necessary to go through there which was approximately 280*feet;* that there was a diagonal stretch that they blasted out which, of course, should take the measure at the maximum width, which would be more than thirty feet; that the area was originally the channel which was passing thirty or forty or more second-feet of water; that

we blasted simply to utilize such natural passage that was there to save power." (R. 109).

The first trial of the instant cause was had before His Honor, Mr. Justice Bean. After the testimony had been completed, Judge Bean died, resulting in a retrial. Much of the testimony taken before Judge Bean was introduced here, before His Honor, Mr. Justice Fee, who tried this case in the District Court. From the testimony taken before Mr. Justice Bean, and introduced here, we submit the following. This is an examination by Judge Bean of Floyd W. Allen, construction engineer for the cement company:

"'COURT: How wide? MR. ALLEN: Being a width of 30 feet in width. COURT: What depth? MR. ALLEN: And a depth of 6 feet below low water. COURT: What? MR. ALLEN: Six feet below low water. COURT: How much is that below,—A. (Mr. Muirhead): That would be an elevation of 63. COURT: How much is that below the ordinary depth of the water? MR. ALLEN: That is 12 feet in here. COURT: You said something about five feet. MR. ALLEN: Holes were drilled five feet, so you have to take down six feet in order to get that area. Thence north seven degrees west, thirty feet to the point of beginning. By taking a line thirty feet in width and approximately 220 feet in length, and to be excavated to a depth of six feet below the water level.'" (99-10) (R. 116).

Further questions by Judge Bean:

"'Q. How many second-feet of water do you require for operation? A. In the ultimate development of the 2,000 kilowatts we require the entire 1347 second-feet; on the thousand we require 675 second-feet; thirteen hundred is 930 second-feet. COURT: What is the capacity of your proposed de-

velopment? A. It is proposed—the first development will be a thousand kilowatts plus the present three hundred. COURT: I asked how much it was. I don't care how you arrived at your conclusion. I would like to know the amount. A. The first development (100-11) would be 1300 kilowatts. Q. approximately how much horsepower? A. That would be seventeen hundred horsepower. COURT: Is that the proposed capacity of the development as now planned? A. As now planned, yes. COURT: Thirteen hundred? A. Wait a second; we planned for the full two thousand kilowatts. COURT: You said you proposed to lower your canal; four feet; or four and a half, whatever it was: now, how much did you estimate that that would provide? A. It would provide 2,000 kilowatts delivered at the cement works. COURT: That is the limit of your proposed development? A. Yes, that is the limit of our proposed development. COURT: *How* many second-feet of water would you require for that? A. 1347 second-feet. In other words, we would not be able to develop that full amount of— COURT: I am just asking what you proposed to do'." (Tr. 25). (R. 117-8).

There was also offered the testimony of Allen before Judge Bean, as follows:

"I desire to offer in evidence also from this testimony the following: It is just question and answer from page 106 of the testimony of the witness Allen: 'How much more water would draw through there when you lower your canal than if you had not excavated this blasted out area? A. Well, would draw between — in other words, this whole thing is contemplated to draw the 1347 second feet through it, at a stage of the river which will permit it'." (R. 117).

and also the testimony of Mr. Muirhead:

"He testified that it is the intention of defend-

ant Cement Company to deepen and widen the existing canal sufficiently to pass the amount of water that it will be able to get with its diversion in the river as contemplated in this case.

Asked to state how much water this would be in second-feet, he replied it will be large enough to take all of the water that we have under permits and application, 1347 second-feet; not that the company expected to get that much all of the time, but to have it so that they can use it when it is available.

Asked if the plant was to be constructed so as to draw in and utilize 1347 second-feet, he answered: 'Yes'." (Tr. 11). (R. 112).

"Asked whether he had answered the question as to how much his company intended to widen and lower its canal, he stated that he thought that he had said that it would increase its dimension to a size that would permit the taking of the entire amount of water that the Cement Company would be permitted to take *by its permits and applications.* (Counsel agree that the witness here refers to the *permits;* that the permits are now in the name of defendant City and *covered by the contract between the defendants,* copy of which is attached to the answer)." (R. 114).

Plaintiff's (petitioner's) Exhibit 13 (R. 149) was used by Mr. Muirhead to designate the area which he said he intended to excavate to a depth of six feet below the low water, or to an elevation of the water surface 1063.5. The witness was asked to indicate upon this exhibit the portion of the area to be removed as a result of this blasting. We believe his testmiony, with the exhibit, will give the information:

He testified:

" 'This area to be excavated 6 feet below low

water or to elevation of 1063.5 plus or minus.'

His attention was directed to the arrow pointing to certain rocks and to the heavy lines on the map and also to the two light lines. He was then asked to point out what operation the company intended to indicate by said legend as to the portion of the area to be removed; whether it was all of the portion embraced within the heavy lines or (92-3) were embraced in the light lines. He answered:

In the heavy lines; that the light lines represented the boundaries of the reef and islands as they existed prior to the shot, and the solid light lines represented the area that is now in a shattered state, and it is difficult to say whether it is in the original channel or solid rock but that now it is apparently solid because of the 'cast up' from the blast." (R. 108-9).

EXHIBITS.

For a better understanding of testimony that follows it will be helpful to examine certain of the exhibits illustrating the testimony, and they are set forth as follows:

PLAINTIFF'S (PETITIONER'S) EXHIBIT 9 (R. 135)

This exhibit was made by Olsen, petitioner's engineer, to illustrate the conditions of the lands and river on petitioner's land that would result at low water from a removal of the rock shattered by the explosion and the deepening of the cement company's canal where it would receive the water through the opening made by the blasting. (R. 137).

PLAINTIFF'S (PETITIONER'S) EXHIBIT No. 10 (R. 139)

This exhibit was made to illustrate a partial diversion of the water from petitioner's lands, which the defendant Muirhead testified they intended to make by excavating the shattered area. His testimony, elsewhere quoted under the heading "Cement Company Would Make a Fish-way of Petitioner's Lands," was to the effect that when the cement company's plans were carried out, the excavation made, and the canal deepened, there would yet remain, at the ordinary stage of the river, about 122 second feet on petitioner's side of the river, on its said land. (R. 114).

The reef being the controlling factor, would, as is shown on Exhibit No. 10, leave a strip of dead water, from which would trickle the 122 second-feet through the cement company's fish-way. The Exhibit No. 10 and its use is further explained in the condensed statement, as follows:

> "As to Exhibit 10 he said this was supposed to indicate a partial diversion; that it would be difficult to state how much water would be flowing through the probable course of the canal on the stream, as inidcated on the exhibit. The exhibit indicates no definite amount of water. That the exhibit is made to illustrate the thread of the stream regardless of the quantity of water flowing in the stream, and based upon an elevation of 1069 at the headgates. That no one could make a calculation of the amount of water flowing over the irregular reef at 1069; that it has a very irregular surface, and he did not make any calculation; that he

did not think an engineer could make a very accurate determination of the flow over the reef at a stage of 1069 and 1069.4, but only an approximation." (R. 158).

"The witness then testified that he had then prepared plaintiff's Exhibit 10 for Identification, which was a map illustrating conditions when the diversion should be only partial. The map indicated that there would be a small amount (112-23) flowing down the east side designated on the exhibit 'probable course.' He stated the use of the word 'probable' was due to the fact that it was practically impossible to exactly show just where that small stream would flow due to the irregularity of the bottom of the river, as it now exists, similar to the reef. It would have a tendency to move the thread westerly from twenty to forty or sixty feet, and in some places scarcely any distance; but dependent, as said before, upon the river bottom; but there would be a tendency to move, and that would be always in a westerly direction, and there would be undoubtedly portion of Government Lots 1 and 2 entirely dry with no water on them, and possibly in some places little pools of stagnant water would be left." (R. 141).

PLAINTIFF'S (PETITIONER'S) EXHIBIT No. 12 (R. 145)

On said exhibit are the letters A-B, indicating the reef upstream on the West, respondents' side, of the river, and the letters C-C, being the controlling reef on the east side of the river. This cross-section shows in detail what would happen if the water were drawn down to an elevation of 1068 at the cement company's headgates; that then, all of the water would be on the west side of the river, due to the fact that the lowest

point of rock on the easterly side of the reef is about 1068. (R. 147).

PLAINTIFF'S (PETITIONER'S) EXHIBIT No. 22 (R. 340)

This exhibit and cross-section shows the outline on the reef C-C as the same was located by soundings made in the river on April 26th, and 27th, 1931. (R. 348). Witness Olsen described the manner in which the soundings were made, and the care with which they were taken. (R. 351-2-3.) The soundings were made to obtain an accurate contour of the bottom of the river at the controlling reef C-C.

PLAINTIFF'S (PETITIONER'S) EXHIBIT No. 2 and No. 23 (R. 350)

Plaintiff's (petitioner's) Exhibit No. 2 and No. 23 is a map showing the river in a state of nature, at normal flow, and prior to the blasting, the blasted area being indicated on the west side of the river by an arrow pointing thereto from the words "blasted area." Exhibit No. 2 became Exhibit No. 2 and No. 23. Olsen testified that he had platted on Exhibit No. 2 the reef indicated by the letters C-C, with the word "reef." He stated that he had also made Plaintiff's Exhibit No. 23; that Exhibit No. 23 and No. 2 are identical, with the exception of the outline of the reef C-C, so that the two exhibits are really the one, No. 2 having the reef indicated on it was marked No. 23, and the exhibit became No. 2 and No. 23 (R. 347-8).

The condensed statement of Olsen's testimony shows the following:

> "The witness testified that he prepared plaintiff's Exhibit 9 for Identification to show the effect on the thread of the stream if the diversion thereof should be complete, and that this was plaintiff's Exhibit 9; that it is the same as plaintiff's Exhibit 2, with this difference: That the water surface as shown on Exhibit 9 is during low flow with the complete diversion into the canal." (R. 137).

And the following additional excerpts:

> "But this particular map (plaintiff's Exhibit 9 for Identification) shows the conditions under the circumstances when all of the water would be diverted and no water would be flowing on the east side of the river." (R. 138).
>
> "The witness testified that assuming that the canal is so lowered and widened (according to former testimony), and the (111-22) diversion complete, that Exhibit 9 for Identification correctly shows the thread of the stream as it would then be; that Exhibit 9 shows the then condition of the south portion of plaintiff's Lot 1 and the condition of plaintiff's Lot 2 with reference to the river under such conditions. It shows no water passing over the reef, C-C, and shows the thread of the stream moved over all the way from 60 to possibly 150 feet; 60 feet on the upper end and 150 on the lower end." (R. 137).

Exhibit No. 2 and No. 23 is inserted in this brief and indexed therein. Its purpose is to show the river in a state of nature, and to bring out prominently the reef C-C which is the controlling reef, which controls the water currents on petitioner's side of the river.

EFFECT OF REMOVING FROM THE BED OF THE RIVER THE ROCK SHATTERED BY THE DYNAMITE.

We quote from the testimony of Harry Olsen, engineer for petitioner. He refers to Plaintiff's Exhibit 2, which is a map originally introduced for the purpose of showing the situation of the river with reference to the currents and reefs of rock therein at the point of contest, prior to the removal of the blasted area, or the deepening of the cement company's canal at that point. It showed the river in a state of nature.

The Exhibit 2 was later made Exhibits "Plaintiff's Exhibits No. 2 and No. 23." (R. 350). This change in designation resulted from additions made thereto, and the exhibit as it originally was, and as it is, plus the changes, is described elsewhere in this appendix at page 129.

The effect of removing the shattered area, and deepening and widening the canal accordingly, would be to substantially change the thread of the stream, leaving most of petitioner's lot 1 dry, and all of petitioner's lot 2 dry, and changing and varying the thread according to the requirements of the cement plant.

For a better understanding of conditions, we submit first the testimony of Harry Olsen. He entered the employment of the petitioner in 1923 as an engineer. He is a civil hydraulic engineer and a graduate of Stanford University in that profession, with fifteen years of ex-

perience. His qualifications were admitted. (R. 128-129).

Mr. Olsen described Exhibit 2, which had been prepared by him, and which shows the condition of the river normally. He also described the manner in which the waters of the stream at the place in question were divided by natural reefs of rock.

An examination of that "Exhibit 2, and 23" will be helpful to an understanding of the following testimony given by him:

> "He testified that he was familiar with the portion of the river at the property involved here; that in the stream there were natural objects that were controlling factors in the diversion of the water; that he had indicated them on this map, Exhibit 2. That the flow of the stream at this point is really controlled by natural rock barriers or reefs which, on the map would be described as running along the line A to B down from B to C. And from C to C again, the letters being repeated C-C; that this is a natural reef and the tendency along the line A-A and above is for the water to come down the river so as to discharge approximately half on either side — half on the east side and half on the west side of the stream; that the amount of the water there coming down is practically evenly divided at that point.
>
> That the dividing line between Lot 1 and Lot 8—that is, plaintiff's Lot 1 and the defendants' Lot 8—is the thread of the stream; that as the water passes this line A-A a portion of it flows over this reef designated as B-C in a westerly direction. That is to say, from a point 500 feet down stream from this line A-A there is approximately two-thirds of the flow of the river flowing on the west side of the thread of the stream and approxi-

mately one-third on the east side. Then as it flows down the tendency is for it to flow back into the natural channel again so that down below and opposite plaintiff's Lot 1 and defendants' Lot 8, there is again practically half of the stream on the east side and (109-20) the other half on the west side.

That this reef so described indicates the natural division of the water in a state of nature; that the exhibit correctly shows the location of these lands of the respective parties and the stream and the thread thereof and the reef. That as pointed out the reefs are the controlling points in the division of the water under natural conditions and the area shown above the present headgates of defendants' power canal could be designated as a forebay; the power-house is not shown on the map but is approximately half a mile south of the headgates shown." (R. 130-1).

Quoting further:

"He stated that he had drawn or platted the description of the blasted area to be removed according to the testimony given at the former trial of this case, thirty feet wide by 220 feet long; that this information was taken from the testimony of Allen, defendant Cement Company's engineer. That this area is the same as is shown in yellow (117-28) in plaintiff's Exhibit 2 as there corrected by the witness to avoid an obvious error, mentioned above." (R. 151).

We also add the following from Olsen's testimony:

"That as far as the physical construction is concerned the only thing necessary now to be done to draw off the entire flow, would be to remove the rock in the blasted area, and deepen the canal; that the canal would have to be deepened from three to four feet." (R. 157).

As to the effect of removing the shattered rock, Olsen testified:

"It was then stated to the witness that the testimony already offered showed that the defendant Cement Company intended (110-21) to lower the bottom of its canal leading to its electric plant from 4 to 4½ to 5 feet.

He was then asked if the canal was so lowered and its shattered area of the rock removed, what would be the effect of the thread of the stream as to the amount of water upon plaintiff's Lots 1 and 2. He answered that during low flow of the river with the lowering of the canal and the enlarging thereof and the removal of this rock, the tendency would be to divert the entire flow of the river over to the west side, taking it down into the canal, leaving the lower portions of Government Lots 1 and 2 absolutely dry, and the effect on it would be to move the thread of the stream westerly anywhere from 60 to 150 feet; that there is that variation in distance as given, due to the fact that at the point designated on Exhibit 2 is a reef, while up to that point the thread of the stream would not be moved. The reef referred to is that marked "C-C" on Exhibit 2.

The witness corrected his testimony and said that the change thus made would take the water entirely off of plaintiff's Lot 2. (Tr. 50)." (R. 132-133).

Mr. John Boyle, petitioner's engineer and assistant manager, testified upon the effect on the water on petitioner's lands and on the flow of the river. He referred to and used Plaintiff's Exhibit 2, now called No. 2 and 23.

We quote from Engineer Boyle on the same subject:

"The witness took plaintiff's Exhibit 2 and testified that the reef shown thereon extends across

the river from the west (140-48) side along the section marked 'A-B' to nearly the center of the river; thence it extends southerly along the section marked 'B-C', this section being near the center of the river; it then extends easterly to the east shore of the river along the section marked 'C-C'. That the effect of this reef has upon the division of the waters of the stream between plaintiff's lands and those of the defendant's is this:

It retards the flow of the river above the reef, the water flowing more rapidly from the down stream side of it. The division of the water is approximately one-third through the reef shown as A-B, one third from east to west over section B-C. and one-third over section shown as C-C. That the reef marked 'A-B' runs through the head of the shattered area. That at the time he looked the premises over, immediately following the explosion of the dynamite, he did this with reference to the effect that this work might have upon the flow of the stream, and the division of the water between the parties hereto, if the rock shattered by the explosion should be removed from the shattered area." (R. 192-3).

Mr. Boyle further testified:

"His attention was called to the testimony of Mr. Muirhead, and to Mr. Muirhead's intention of having the shattered rock removed and the sides of the blasted area leveled up and smoothed, and he said that if the area described by Mr. Muirhead is excavated to completion, the effect would be that *all of the water from the river could be taken to the west side and used through the proposed power-canal.* That it would be taken through the power plant as the load became sufficient to require that quantity of water; that the channel to be so completed, as described by (141-49) Mr. Muirhead, would have sufficient discharge area to permit the discharge of 1347 second-feet of water at a water surface elevation of 1069, 1068 or

1067, whatever surface elevation it was there desired to draw the water down to in order to produce the power required at the cement mill; this result, of course, to be contingent upon the completion of the intake gates of the canal and the excavation of the canal, as shown upon plaintiff's Exhibits 6 and 7. That in this he was including the widening and deepening of the canal as had been testified to, in order to make the full use of the 1347 second-feet. That when this should be done the following would be the effect of the water upon plaintiff's Lots 1 and 2, namely:

The maximum amount of power could be obtained from the proposed power-house when the water surface elevation is maintained so no water is running over C-C, as shown on plaintiff's Exhibit 2.

Asked what effect would this have upon the thread of the stream, what change if any would thereby be made from the same as it now is shown on plaintiff's Exhibit 2, he answered:

That when there would be no water flowing over section marked 'C-C', the thread of the stream would be moved westerly at section C-C to the center of the forebay or intake of the power canal. Asked how much approximately the thread of the stream would be fluctuated by these uses of the water according to the demands of the cement mill, he answered: That the thread of the stream would be moved to the center line of the forebay or intake canal opposite C-C, or it could not be moved at all, according to the load required at the cement mill, and the amount of water permitted to flow over section C-C. *That the thread of the stream as indicated on said Exhibit 2 would be fluctuated back and forth, according to the load from* (142-50) *time to time as utilized at the cement mill.* That the greatest distance that the thread of the stream would thereby be changed, moving westward from its present location, would be *one hundred to one hundred fifty feet, opposite the lower*

end of Lot 1, between the south end of Lot 1 and section C-C.

Asked what would happen if the varying quantity of electricity that would be required from time to time with reference to the amount of water that would be left on plaintiff's Lot 1, during the fluctuation operations; whether there would be places that would be entirely without water above the line C-C and the condition below that line.

He answered: That above section C-C he doubted if any operations would take all of the water out of the *pond,* which might be called a 'forebay' of the intake gates; that the river bottom there is *considerably lower* than the water surface; that at section C-C, which controls the flow of the water on the east side of the river, there would be no water flowing, and so below or down stream from section C-C, the river would be dry at times, and having water flowing on it at times, depending upon the operation of the cement mill. That during such conditions there would be water flowing over the spillway below C-C; that if the water surface is maintained below section C-C at the spillway elevation, Lot 1 would be dry as all of the water would be flowing through the power canal through the power plant." (R. 193-5).

"But if the shattered rock be not removed he said: That if the shattered area should not be removed but left as it is, and there is just a natural flow of the stream, then under normal conditions two-thirds of the water would flow to the west side below and west of A-B and B-C without excavating in the reef." (R. 196).

WITH THE SHATTERED AREA REMOVED, AND THE CANAL WIDENED AND DEEPENED, ACCORDING TO THE CONTENTIONS OF THE CEMENT COMPANY, AS EXPRESSED IN THE RECORD BY BOTH MUIRHEAD AND ALLEN, THE OPERATION OF THE CEMENT MILL WOULD, AT TIMES OF MEDIUM FLOW, TAKE ALL OF THE WATER IN THE RIVER.

Respondent cement company's engineer, Floyd W. Allen, testified upon that point, as follows:

> "Q. But as a matter of fact in the operation of your cement plant, when you needed all the power you could get, you could take all that water, couldn't you?
>
> A. If you would want to set up a condition, ideal that is for taking all that water; probably you could under certain conditions take all the water in that river; but from the plan of operation and our intention of manufacturing both the electrical energy and how we intend to control the plant, plus the control of manufacturing cement, and the load we intend to put on it at that time, I do not think we will draw down the river below 1069.
>
> But the fact remains that by the operation of your cement mill to get the power, all the power that you can, you can do it, can't you?
>
> A. *I have repeatedly said that we could.*" (R. 379).

Upon this same subject, Mr. Olsen, for the petitioner, testified at length. We quote:

> He testified that he understood the operation of the electric plant to be installed as described by witness Muirhead; that the operation of a such a plant would be governed by the power requirements at the cement mill, and that as these power

requirements increased more water would be required; that as they decreased less water would be required, with the resultant effect that at times there would be no water going over the reef designated on the line C-C, but at other times there might be a slight amount of flow over on the east side of the river." (R. 137).

"He testified that the controlling factor as to the amount of water which would be drawn from the upper part of the stream and diverted from the east side woud be the amount of power required by the Cement Company at the cement mill." (R. 156).

We quote Engineer Boyle upon the same subject:

"He stated that by lowering the water at the headgates of the defendant's canal, all of the water could be drawn up to a discharge of 1347 second-feet. That if, at the time, there were only 1,000 second-feet of water flowing in the river, the operation would draw all of the water flowing on either side of the west bank above the point into the canal." (R. 209).

Mr. W. H. Muirhead, Vice President, and in full charge of the cement company's operations in all the matters with which we are concerned, testified as follows:

THE TYPE OF POWER PLANT WHICH THE CEMENT COMPANY INTENDS TO INSTALL, WITH THE APPROPRIATIONS SOUGHT TO BE MADE.

We read from the record:

"He testified that his company intended to build a hydro-electric plant for the manufacture of electric power by the use of turbines and generator

with the use of the flow of the water, and a given head and volume; that the turbines will be equipped with gates that will be automatically operated according to the amount of power used at the cement mill; that when the electrical load is taken at the cement mill the amount of water required to make that quantity of electricity will automatically be let into these turbines or wheels and only that amount of water; that it will operate in that way except that here is a maximum which the company can take because if the company drew more than a certain amount of water it would drop its head and lose efficiency." (R. 111).

John C. Boyle, assistant general manager of petitioner, an engineer, a graduate of the University of California, and whose qualifications were admitted, (R. 188), heard the testimony of Mr. Muirhead, and concerning the type of plant, testified, among other things, as follows:

"The witness heard the testimony of Mr. Muirhead, vice-president and treasurer of the Cement Company, and in charge of the operation of the cement plant. He stated that he heard the description given by Mr. Muirhead of the kind of plant he (137-45) intended to install for the defendant Cement Company; that he was acquainted with that type of plant. This referred to the proposed electrical plant to furnish power for the cement mill. He testified that he had to do with the operation and installation of such plants; that we (meaning plaintiff company), had five similar plants in operation on its system under his charge.

He explained that this type of electric plant operates automatically. That is, that the amount of load delivered at the end of the line, or at the motors in the cement mill, is automatically taken care of by the automatic feature of the electric plant, allow-

ing sufficient water to run through the turbines to pick up or drop the amount of load necessary to be delivered; that by the term 'load' he meant the amount of energy required to run the motors, lights and different electrical installations which are installed at the delivery end of the distribution lines.

That the amount of electricity required at the cement mill from moment to moment, or hour to hour, during the operation thereof, is determined by the numbers of motors and other appliances that are put in service, or taken out of service at any time of the day. That is the amount of power required at the cement mill is suddenly and greatly increased, this is supplied automatically; the electric plant would automatically pick up the amount of water required to generate the load—the energy for the load that is picked up. That in the operation of the cement mill the load would be changed by a man disconnecting or connecting his motor, or it could be changed by the different load conditions of the motor itself. That assuming that a certain amount of electricity is being used at the cement mill and more was suddenly turned on at the cement mill, the power would be drawn from the distribution line running to the cement mill. The amount of power plus (138-46) loss in transmission, and in the line added to it, would be the amount of power which the electric plant would have to pick up. *The sudden turning on of that power would automatically increase the quanttity of water necessary to pick up the additional load. He explained that there is a set of gates that are operated by a governor which is electrically controlled.* These gates open and close *on the turbine itself,* allowing the required amount of water to go through to generate the load as indicated by the delivery at the end of the distribution line. These gates are operated automatically; that if there is no load on the cement mill, there would be no water flowing through the electric plant. As the load is picked up at the electric plant, the amount

of water required to produce the load is drawn from the canal and through the canal up to the full capacity of the electric plant, if the load requires it. That when the cement mill draws no current at all, the water is automatically shut off at the electric plant wheel; that the effect which this has on the water in the canal and on the water in the forebay above the canal is that the water will seek its own level, and build up to the spillway level, above the spillway level until the quantity of water flowing in the river can discharge into the spillway, or be forced back into the channel of the river above the intake gate." (R. 188-191).

And further, as follows:

"That through the demands of the peak load upon the electric plant, the flow would—in such an automatic plant—increase to a point where it would take care of the load. That there is no automatic limit to the amount of water which would be drawn through the gates; that this depends upon the demand of load; that the load is the demand. That there is no automatic limit upon the amount of water drawn through the gates, except the demand of the load. That you cannot operate the plant automatically and still limit its capacity. That the plant cannot be so regulated that not more than a certain amount of water will be drawn from the stream through the plant under varying load conditions. That you might limit the maximum point or the maximum amount you could take from the plant, but below that maximum you would have no control (154-62) over it. But that you could so set it that the maximum would not be passed. So that it is a matter of operation by the company of this machinery. That you could set the machinery so that it should not so operate as to take more than a certain amount of water through it. But that you could not so set the machinery that a given head will be maintained at the gates with a given elevation so as not

automatically to draw the head down below a certain point. That you cannot set this machinery so automatically the water would not be drawn down below 1069. That it would depend upon the load that you are carrying. The water elevation would depend entirely upon the load you were carrying up to a limit, if you want to put a limit on it, but that that limit cannot be put at a point which will maintain that elevation at the headgates. It is an engineering impossibility." (R. 208-209).

Mr. Boyle further said:

"That in the *ordinary operation of the cement plant,* the *usual* thing to do would be to draw the water from plaintiff's property whenever the flow was less than 1340 second-feet; that naturally (146-54) if the power is required by the Cement Company's use, it would be economical and proper in the operation of the plant to draw all of the water—get all of the water available." (R. 199).

STAND-BY PLANTS AND THEIR USES EXPLAINED

Stand-by plants. The evidence shows that the petitioner requires its said property for the operation of a stand-by plant.

These and their uses are described as follows: J. C. Thompson, division manager of petitioner, and whose testimony begins at R. 160, stated in substance as follows:

"Explaining the meaning of the term 'stand-by plant' he said that such utilities, where their plants were removed from the center of distribution, usually maintain steam plants near the center of distribution, but that this plant would serve the same purpose that a steam plant would serve.

It would be located near the center of distribution there, 12 miles from Medford, and equidistant from Grants Pass, and enable the Company to give stand-by service at Medford and Grants Pass, and at the Cement Company's plant at its quarry and the Illinois Valley.

He explained that the plaintiff's closest plant of (129-37) any size was at Prospect, approximately forty miles from the site in controversy, and back in the mountains on the upper Rogue River; that there were also plants in California, the Copco plant on an air line being about one hundred fifty miles from the site in controversy; that the transmission line comes into Medford over mountainous territory over the Siskiyou mountains. That the line is located in a territory subject to heavy snowfall, and subject to interruptions by the falling of trees on the line, so that a stand-by plant, such as is described, is partly used for protection against interruption in the service. Besides that, this plant would generate quite a little bit of power, estimated in 1926 to be about 5500 horsepower."

"That in 1922 it put in a second unit at Copco Number 1 of 18,000 horsepower, cost roughly $600,000.00; in 1923 and 1924 it put in the east side Klamath Falls plant of 4,200 kilowatts, cost approximately $600,000.00; in 1925 it put in Copco Number 2 with 44,000 horsepower, at a cost of three million dollars. In 1926 and 1927 it finished the plant of 44,000 horsepower, estimated to cost three and one-half million dollars; that in July, 1926, defendant City offered for sale its hydroelectric plant and plaintiff sought to purchase it, and submitted an offer of $40,000.00 for the plant. The defendant Cement Company offered $22,600.00 with practically the same conditions, except that the plaintiff's (130-38) was for cash, and the Cement Company's for one hundred dollars a month. That the propositions were submitted to an election resulting favorably to the Ce-

ment Company." (R. 165-6-7). And by engineer Boyle as follows:

Engineer Boyle testified in substance:

"That such stand-by plants run continuously and are in continuous serve. They regulate the voltage in case of line interruption. That they are in continuous operation except to regulate voltage in case of line interruption. They serve an emergency and are operated continuously irrespective of emergencies." (R. 203).

"The witness stated that the plaintiff had seven plants that were operating as stand-by plants, as a part of its property, and they are connected with five sawmill plants at the present time for stand-by service. That the five sawmill plants are not the only steam plants which plaintiff has as stand-by plants, but the plaintiff is operating one steam stand-by plant which is at Coos Bay.

He stated that the fundamental purpose of a stand-by plant is to pick up the distribution load of a community in which it is located and to regulate the voltage in which it is located for proper service to a customer. That the (148-56) plaintiff requires the property in question for this purpose, and this is the purpose for which the plaintiff acquired its property involved herein. That such property is useful for carrying out the plaintiff's business in the community in which the property is situated." (R. 201-2).

"One at Gold Hill (Gold Ray), two in the city limits of Klamath Falls, one at Keno, just a short distance from Klamath Falls, one at Shasta River, close to the town of Yreka, one at Winchester, close to the town of Roseburg, and one at North Bend on Coos Bay." (R. 202).

RESPONDENT CITY'S UNDISPUTED WATER RIGHT. THE WATER FOR THESE RIGHTS FLOWS NATURALLY INTO THE CITY'S PRESENT PLANT, AND THE CEMENT COMPANY'S CONTEMPLATED PLANT, WITHOUT REMOVAL OF ANY OF THE ROCK FROM THE SHATTERED AREA.

It has a water right adjudicated to it in the adjuication proceedings of 220 second-feet on its west side of the river. It acquired an additional 75 second-feet, known as the McClure Right, on the East side of the river. The decree of adjudication required that water to be returned to the stream *above* the petitioner's lands.

Petitioner, though not bound by the decree of adjudication, did not dispute these rights nor question them.

The cement company seeks, in this proceeding, to use the McClure 75 second-feet, by drawing the same through the shattered area, after the removal of the shattered rock, and the deepening and widening of the channel made thereby, and put the same through its proposed power plant. It is undisputed that this quantity of water, 220 second-feet, plus the additional 75 second-feet from the petitioner's side of the river, will naturally flow into the cement company's contemplated power plant, just as it now will flow into the small municipal plant purchased by the cement company.

We set forth from the record, the testimony of Boyle upon this subject:

> "The witness' attention was called to the City's claim to 220 second-feet, adjudicated to it, plus the 75 second-feet adjudicated as the McClure right; which latter right is on the plaintiff's side of the river.
>
> The witness was asked that if, assuming that the defendant City desired to use the total of these two rights, to-wit: 295 second-feet at the defendants' proposed plant, whether or not this quantity of water could be taken into the plant, without the removal of any of the shattered area; that is, whether water flowing in a state of nature would find its way down into the head of the defendant's canal. (144-52).
>
> The witness answered: Yes, that even with extreme low water in the river, the defendants could still get the said amount of 295 second-feet without making the excavation of the shattered area, that is, the removal of the rock shattered by the explosion." (R. 196-7).

Upon this subject Mr. Muirhead, in the trial of a former case between the same parties, No. 5806, reported in 35 Fed. 2nd, 317 (1929) testified upon that subject. The former case is referred to herein at R. 414 (73 Fed. 2d, 558). That testimony was introduced into this case, and we quote it:

> "A power plant runs all the year around, runs (153) all summer, really runs steadier in the summer than in the winter; therefore it is necessary to provide for continuous operation during July, August and September when the river is at the lowest, and all the water of the river is needed during these months. He testified:

Q. Could you get along with 220 second-feet?

A. Could we?

Q. Yes? A. No, we could not.

Q. Wouldn't be of any benefit to you at all, would it?

A. 220 second-feet would be of some benefit to us.

Q. You would not put in this installation if you could only get 220 second-feet, would you?

A. No, I don't think we would, although we have contemplated starting this little generator that is up there temporarily and running it on this; but we have never done it.

Q. But you could easily get 220 second-feet without going clear across the river for it, couldn't you?

A. Yes.

Q. Wouldn't have to cross the thread at all and go to any expensive work at all to get 220 second-feet, would you?

A. No, I don't think we would.' (154)." (R. in Number 5806, pages 219, 220).

THE CEMENT COMPANY WOULD TAKE THIS POWER AWAY FROM PETITIONER AND SELL WHAT IT DID NOT USE.

The cement company seeks to deprive petitioner of the use of the water in question by making electric power therefrom to operate its cement mill, and to sell the surplus in the market. This would be in competition with the petitioner. The cement company is not empowered to act as a utility.

We quote from the record showing the testimony of Mr. Muirhead given on cross-examination as a witness for his corporation:

"Asked if their electrical plant was to be built only for the manufacture of cement, he answered: That it was built primarily for the manufacture of cement, but that the company had a contract with defendant city to supply it with twenty kilowatts free, and any additional that it might want at one cent per kilowatt; that the company had opportunity in addition to that, unless stopped by the utility, of selling to any other customer that might be developed in that territory. And they would do that should the customer present himself.

When his attention was called to the fact that the pleadings show 'not a public service', he answered: Wasn't that the question you asked, depends entirely on the service? He stated that the Cement Company could operate the plant solely for cement use, but naturally if it had an investment there, it would want to make the best use of it it could, and should business be such some year that they could sell only fifty per cent of their usual amount of cement sales, and the mill would be down proportionately lower, and they could find an outlet for their power, they would certainly sell it." (R. 334).

Asked as to the amount of power which the cement company would be required to furnish the city under their contract of purchase, he testified: "About twenty kilowatts."

This is his testimony:

Mr. Muirhead, for the Cement Company, testified as to the City's requirements, as follows:

"Asked as to the amount of power the Cement Company was required to supply to the City of Gold Hill at one cent per kilowatt hour, he stated: That it was supposed to give 20 kilowatts free and obligated to give any additional they want over that amount without limitation up to the com-

pany's capacity of one cent per kilowat hour." (R. 113-114).

Mr. J. C. Thompson, petitioner's division manager, testified that the requirements of the city were only 170 horsepower.

We quote from the Record:

> "The witness testified that the amount of power consumed by the City of Gold Hill is less than 170 horsepower within the city limits. This is the maximum demand. He testified that a kilowatt is three-quarters of a horsepower. (131-39)." (R. 168).

On the amount of power that could be made with the 220 second feet, plus the McClure 75 second feet, to wit: 295 second feet, at the effective head which the testimony showed to be available at the point of use, Mr. Boyle testified:

Mr. Boyle:

> "He stated that the 220 second-feet, at a surface water elevation of 69, and an effective head at the power-house of 23 feet, would give 350 kilowatts. He stated that assuming the same conditions in the use of the 220 second-feet as were assumed in the use of the full 295 second-feet, with a surface elevation of 69, and an effective head of 23 feet, 350 kilowatts would be produced at the proposed plant. (Tr. 132.)" (R. 201).

CEMENT COMPANY WOULD MAKE A FISHWAY OF PETITIONER'S LANDS

Mr. Muirhead, for the cement company, was asked how much water would be left in the river if he removed the shattered area, changed his canal as con-

templated, and operated the kind of a cement mill described in his testimony. He testified, in effect, that he would have to leave 122 second-feet for a *fish-way*. We quote his testimony:

> "Asked how much water he contemplated would be left on plaintiff's Lots 1 and 2 when the Cement Company's (97-8) plant should be in operation, he stated that he believed that at the very minimum there would be 122 second-feet flowing down the east side of the river on said lots, and witness then added: 'And which we will have to permit to run there as a fishway. I believe there is a law passed that requires that.' (Tr. 14).
>
> Plaintiff's counsel, having stated that he knew of no law requiring a fishway on plaintiff's land, the witness answered:
>
> 'Well, it has to be down the river at least, and of course it couldn't get down to the canal through our turbines, so we will leave that originally'." (R. 114).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 612

THE CALIFORNIA OREGON POWER COMPANY, A CORPORATION,

Petitioner,

vs.

BEAVER PORTLAND CEMENT COMPANY, A CORPORATION, AND CITY OF GOLD HILL, OREGON, A MUNICIPAL CORPORATION,

Respondents.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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April 4, 1935.
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To the Honorable the Supreme Court of the United States:

The Petitioner respectfully asks permission to file and herewith submits the following Reply Brief in answer to respondents' brief:

Petitioner Corrects Respondents' Errors.

Repeatedly the respondents have asserted that the petitioner's predecessor was a party to and asserted rights in

the adjudication of the waters of the Rogue River. Exhibit "O", the decree of adjudication (R. 294) is relied upon to support these assertions.

In respondents' brief at page 3 it is alleged that petitioner's immediate predecessor in interest

> "was a party to the adjudication, claimed water at another location on the Rogue River about three miles above the location presently involved and was decreed a right by appropriation at the upper location (R. 70)."

The record reference is to Finding VII (R. 70). The finding there made is: "There was adjudicated to California-Oregon Power Company, plaintiff's predecessor in interest, the right to appropriate the waters of the Rogue River in the development of power at a point known as Gold Ray, some three miles above the property of the plaintiff described in the complaint and in these findings," the words "was a party to the adjudication, claimed water at another location on the Rogue River about three miles above the location presently involved", are not in the finding referred to. There is no authority for this statement unless it be the portion of Finding VII, quoted above.

At page 5 of the brief it is stated:

> "Petitioner's predecessor was a party to the general adjudication of the relative rights to the use of the waters of the Rogue River and claimed no right at the location of petitioner's land." There is no authority for this statement unless it be claimed under Finding VII, *supra*.

At page 13 it is stated:

> "Both the riparian land and the owner of it as predecessors in interest of petitioner were respectively involved in and a party to the adjudication." There is no authority for this statement unless it be claimed

under Finding VII, *supra*. The *land* is not described in the decree nor was the petitioner's predecessor "involved" in the adjudication.

At page 14 it is asserted:

> "The California Oregon Power Company, the immediate predecessor of the petitioner, *asserted* and was adjudicated a right by appropriation to the use of the waters of the Rogue River in developing power at a point three miles above the location presently involved. Having thus *asserted* a right by appropriation in the same location that predecessor waived claims to the use of the water of the same stream by virtue of riparian ownership." There is no authority for the foregoing statement unless it be said Finding VII, *supra*. It nowhere appears that petitioner's predecessor "asserted" a right by appropriation.

The decree in the adjudication was not pleaded as an estoppel, nor otherwise. (Answer, R. 20-38.)

The decree was not an issue. According to the record neither the petitioner nor any predecessor in interest of the petitioner was ever served with process in the adjudication. Quotation, brief p. 181-2.

In re Willow Creek, 74 Ore. 592.

It is provided in the Water Code that all claims filed in adjudication proceedings shall be filed with the State Engineer, formerly the State Water Board. All appropriations made subsequent to the enactment of the Water Code must be applied for by filing in the office of the State Engineer. All transfers of such water rights after so filed and recorded must be filed and recorded in the same office. The following sections of the Water Code are applicable:

Sec. 25, brief appendix 11, governing the recordation of the water rights certificate; Sec. 27, brief appendix 12, "The Clerk of the Circuit Court immediately upon entry

of any decree by the Circuit Court or the Judges thereof, shall transmit a certified copy thereof to the Secretary of the Board of Control, and shall immediately record the same in the office of the State Engineer," etc.; Sec. 49, brief appendix 21, provides that any permit or license to appropriate may be assigned, etc., but no such assignment shall be binding except upon the parties thereto unless filed of record in the office of the State Engineer; Sec. 53, brief appendix 22, provides that when an appropriation has been perfected a certificate shall issue and shall be recorded as aforesaid.

So that, pending an adjudication, if claims therein filed, or permits to appropriate water, are transferred, said transfer is recorded in the office of the State Engineer. And the final decree goes to the assignee, as the successor of the claimant. These proceedings, as perhaps was the case in the Rogue River adjudication, are pending in the State Engineer's office for long periods of time. In this case perhaps for a period of from seven to ten years. If the successor to a claim filed in the adjudication enters or becomes a party thereto in the Circuit Court, he is of course substituted for the claimant.

If it had been the intention of the respondents to use the adjudication decree to preclude the assertion of the petitioner's riparian rights, they would have pleaded the same as *res adjudicata*. They did not do so because neither the petitioner nor its predecessor in interest in its lands involved here, was served with process, nor bound by the decree.

Assignment of Errors (R. 83).

At page 4 of respondents' brief it is claimed that petitioner has assigned as errors, the Court's legal conclusions from its findings, and did not question the findings. Briefly they are the following:

I. Petitioner's corporate capacity.

II. The acquisition by petitioner of its land involved herein.

III. The description of the land owned by respondents.

IV. The ownership of the respondents' rights by appropriation which are admitted in the pleadings.

V. The State Engineer's permits calling for 1127 cubic feet per second of water, issued to the City of Gold Hill.

VI. The terms of the contract between the respondents with reference to the purchase and sale of the City's property.

VII. No testimony was introduced that petitioner had used its reparian rights, but that a power right was adjudicated to petitioner's predecessor at an upper location.

VIII. That petitioner's predecessors had not used their riparian rights.

IX, X, and XI deal with the dynamiting of the river bed.

XII. That petitioner has failed to prove a vested right to the waters of the Rogue River "*except* that the plaintiff did prove that it is the owner and in legal possession of its said land abutting upon said river *and extending under the waters thereof, to the thread of the stream.*

XIII. That the removal of the shattered rock would not change the location of the boundary between the lands of the respective parties, and that respondents should be enjoined as set forth in the decree.

Petitioner's assignments of error are found at page 83 of the record. An examination will show that it has assigned as error that the court did not decree in accordance

with the petitioner's claims, these assignments being numbered I to VIII, inclusive. They are complete.

No. XII contains all that is required to define the riparian right for which the petitioner contends herein as the same is defined by the Oregon court in

Jones v. *Conn.*, 39 Ore. 30, cited in brief at page 244.

In that case it was held that the only thing necessary to entitle the riparian proprietor to his riparian rights is to show that the land borders on the stream; that this shows he is entitled, under the law, to the use of the waters subject only to the rights of other riparian proprietors in that stream. So that Finding No. XII is a finding for the petitioner, unless petitioner's rights have been *destroyed* by the Water Code.

The Good Faith of the Oregon Court.

At page 6 of the brief respondents imply that petitioner impugns the motives of the Oregon Court in its decision in the *Willow Creek* case. Far from it.

In re Willow Creek, 74 Ore., 592.

In that case the court was deciding the controversies in an adjudication under the code. A cause had been appealed to this Court from the Federal district court at Portland, *Pacific Livestock Co.* v. *Lewis.* In that case and in the *Willow Creek* case the question of whether or not the Water Code violated the Federal Constitution by impairing vested rights of riparian proprietors, was raised, and the Oregon court in the *Willow Creek* case, endeavored to cover the entire subject looking to a final determination of the constitutionality of the Water Code. The principal claimant in the adjudication claimed *both* as a riparian proprietor and as an appropriator. In that case, 74 Ore. 608, it is stated that the Eastern Oregon Land Company alleged that it was the owner of 7,000 acres riparian to the stream. And

at page 609 it is recited that it also claimed by appropriation out of various ditches, and with various priorities. The opinion held in effect that the settler upon a stream could claim under either doctrine, but that he could not in the same proceeding claim as both a riparian proprietor and an appropriator because the rights were inconsistent and difficult to administer. Having made certain provisions in the decree upon the claims by appropriation, the opinion recited that the company claimed water for 292.02 acres irrigated by overflow waters. It said that the method of irrigation *was crude,* but that it was unimportant how difficult or "with what ease water can be *appropriated for irrigation.*" It then proceeded to allow water for the additional acreage, 292.02 acres.

Whatever view the same court may have taken in 1924, in the *Hood River* case, the record in the *Willow Creek* case gives the impression that the allowance was made under the doctrine of appropriation. We make the following quotations from page 627 of the report:

> "Every riparian proprietor is entitled, as against other riparian proprietors, to a reasonable use of the water of a non-navigable stream flowing through his land, and after the natural wants of all have been supplied he may make a reasonable use of the surplus for irrigation purposes when he can do so without infringing upon the corresponding rights of the other proprietors: *Jones* v. *Conn,* 39 Or. 30 (64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630). See, also, *Little Walla Walla Irr. Co.* v. *Finis Irr. Co.,* 62 Or. 348 (124 Pac. 666, 125 Pac. 270); *Sherred* v. *Baker,* 63 Or. 28 (125 Pac. 826). It was held in *Caviness* v. *La Grande,* 60 Or. 410, 421 (119 Pac. 731, 735), that:
>
> "'In the very nature of things, a court cannot fix in advance by its decree what quantity of water will be reasonable in the future for the use of a riparian proprietor claiming the duty of water in that character.'

> "Our statute was copied largely from the statute of Wyoming, *though the Constitution of that state differs from ours in that riparian rights have never been recognized.*"

It is interesting here to note that the Oregon court, then in 1915, announced that Oregon had obtained the riparian doctrine *through its constitutional adoption of the common law.* For it is stated that our statute was copied largely from that of Wyoming, for the Constitution of that State differs from that of Oregon in that riparian rights have never been recognized in Wyoming.

In the *Hood River* case, 114 Ore. 166, the writer of the opinion in the *Willow Creek* case set forth in the majority opinion, a copy of the Oregon Territorial Statute of June 27, 1844, together with a copy of Article 18, Sec. 7, of the Constitution of Oregon providing that all laws in force in the Territory of Oregon when the Constitution took effect, and consistent therewith should continue in force until altered or repealed. (Cited in petitioner's brief at page 222.)

The petitioner's criticism is that after the Oregon court had announced in the *Willow Creek* case the constitutional existence of the riparian right, and that it could not be destroyed by judicial decree or legislative act, the Water Code then under consideration should, in the *Hood River* case, decided *nine years later,* be held to have abrogated the vested riparian rights which the opinion in the *Willow Creek case* vouchsafed as unimpaired by the Water Code.

At page 624 of the opinion in the *Willow Creek case,* the Oregon court in discussing the Act of Congress of July 26, 1866, announced that the practical construction of the statute was that water could be appropriated as long as the land belonged *to the United States,* but that after the land over which the water flowed had been acquired, the water

was not subject to appropriation, *because* it flowed over private property, citing *the Oregon court, and this court.* (Brief appendix 65-6.)

Report of State Engineer (Resp. Bf. 47).

At page 6 of respondents' brief reference is made to an alleged report of the State Engineer of Oregon set forth in Respondents' Appendix to brief, 47. It appears to be a report of 1930 concerning streams on which "findings" have been entered giving acreage and the number of certificates issued. At page 48, "Rogue River, Jackson and Josephine Counties, 34,188." No certificates are shown to have been issued. The purpose of the "exhibit", if we may call it that, is not disclosed. It is not evidentiary. Its *first* appearance was in respondents' brief. It will perhaps be used for reference. Rogue River flows through Jackson County, before entering Josephine County. How much of the 34,188 acres are irrigated, if that is what the tabulation means, after the water has passed through the lands of the petitioner, cannot be known. But if it is the intention of respondents to use this as an argument that petitioner's success in this cause would disturb water rights to the acreage referred to, we may say now, that there is no occasion for this fear. It has always been the policy of the petitioner to waive in favor of upper irrigations, any rights petitioner might assert to the flow of the stream at the point in question. And it states here and now that it has no intention of interfering by any decree that may be entered here, with any irrigation rights out of Rogue River. Most of the waters so used are taken from upper tributaries and, after use, find their way back into the main stream above petitioner's lands.

Rule of Property.

Frequently throughout respondents' brief there is a reference to "the rule of property." The impression is given that petitioner's claim *rests upon a rule of property.* We have no contention with counsel as to the right of a State to change a rule of property.

The riparian right contended for is a *vested right.* It vested in petitioner's land upon the issuance of the patent thereto, under the Common Law doctrine of Riparian rights. And this right is *part and parcel of the land itself* as much as is any portion of the soil. And while the right is only a *usufruct,* that right *is in, is a part of, and abides with* the land. Such a right is the valuable property right under the authority of this court and the Oregon court. We refer to our points upon this subject numbered as follows:

Point No. 2, brief 77-89; point No. 3, legislative acts must be construed as prospective, brief p. 89-93; point No. 5, the Water Code as construed by the Oregon court violates the Oregon Constitution, brief pp. 121-2.

Weiss v. *Oregon Iron Works* is particularly in point.

An extended quotation therefrom is found in the appendix to the brief, pp. 52-56.

It is not a mere "rule of property" with which we are concerned; but with this changed construction of the Water Code, from the constitutional act it was when discussed in the *Willow Creek case,* to the *unconstitutional act which it is as construed* in the *Hood Rives case.*

However, the appellate court, while seeming to follow the Oregon Court in the *Hood River case,* held that the right of the Oregon Legislature to *destroy* the petitioner's vested right was to be found in the exercise of the police power of the State, *which had not been invoked in the Hood River decision.* The appellate court concluded that peti-

tioner's riparian rights to the natural flow of the stream was "validly abrogated by the Water Code of 1909, as construed by the Oregon court." (We quote in our brief, p. 201). And this the appellate court called "*regulation*", and which we assert is the taking without due process of law.

Riparian Doctrine of Appellate Court.

At page 18 of their brief, respondents quote what they allege is the doctrine of the appellate court applicable here.

We make the folowing quotation from a decision of that court in the year 1912, *three years* after the passage of the Water Code:

> *Eastern Oregon Land Co.* v. *Willow River Land & Irrigation Co.* (Circuit Court of Appeals, Ninth Circuit, November 1, 1912), No. 2,007, 201 Fed. Rep. 203, 213.
>
> "It will not be necessary to enter into a discussion of the statutes and various decisions of the Supreme Court of Oregon defining riparian rights in that state. We will accept the opinion of the learned District Judge in this case upon that question that:
>
> 'The riparian proprietor is entitled to the ordinary and usual flow of a stream as long as it is of any beneficial use to him and this may, under some circumstances, include flood or overflow waters reasonably to be anticipated during ordinary seasons.'"

Natural Rights.

At numerous places in respondents' brief it is asserted that the decree leaves to petitioner its "natural rights," as a riparian proprietor. As construed, the Water Code leaves no rights to the petitioner. By Sec. 1 of the Act, brief appendix 1, appropriations can only be made by application to the State Engineer for permits under the terms

of the Act. It forbids the use of any water except through such appropriations, or from riparian rights that had been used prior to the passage of the Act.

In respondent's brief, p. 59, a citation is made to sec. 66-68, appendix to petitioner's brief, pp. 28-29, as authority that the Water Code provides a penalty for using water in violation of its provisions. Strange to say a decision of this Court is there quoted in support of the contention that petitioner's vested right can not be exercised because of this criminal provision of the Water Code. This is a remarkable contention. A vested right in property can be instantly destroyed by the fiat of the legislature and put into effect by an emergency clause, and thereafter the exercise of that right is prohibited because the legislature has provided a penalty for its use. The mere statement of that contention to this Court is sufficient to preclude any argument. Natural rights are those that naturally go with the land and are the common law rights that were recognized as part and parcel thereof.

Admittedly to allow the decree here to stand, would result in the thread of the stream being moved westward from petitioner's present boundary a distance of 150 to 200 feet, leaving hot, dry rocks over which formerly flowed the clear, placid, beautiful waters of the Rogue River. As stated by Mr. Justice McBride from the bench of the Oregon Court in 1919, ten years after the passage of the Water Code, and in *Hansen* v. *Thornton,* 91 Ore. 585 (brief p. 80):

> "When we speak of riparian rights we are not considering a mere shadowy privilege but a substantial property right, the right of access to and a *usufruct* in the water."

The Desert Land Act.

In their brief at page 43 respondents cite *Boquillas Cattle Co.* v. *Curtis,* 213 U. S. 339-344. That case came to this

Court from the Supreme Court of the State of Arizona. Concerning the Desert Land Act Mr. Justice Holmes stated that the opinion there expressed, made it unnecessary to decide whether the lands in the arid regions patented after March 3, 1877, are not excepted subject to the rule that priority of appropriation gives priority of right by virtue of that Act construed with Rev. Stat. Sec. 2339. "The Supreme Court of Oregon has rendered a decision to that effect on plausible grounds."

The opinion is not an authority in point. The remark of the court as to the plausible ground upon which *Hough* v. *Porter* was based, did not purport to indicate that the State of Oregon was justified in making the construction which it did make of a Federal statute governing property, the title to which was in the United States. Arizona's Constitution was held in that case, in this Court, to be a *rejection* by the State, of the common law riparian doctrine. Later we quote from the *Boquillas* case upon this point.

In a Case Recently Decided by This Court it is Said:

> "The laws of the United States alone control the disposition of title to its lands. The states are powerless to place any limitation or restriction on that control. *Wilcox* v. *Jackson*, 13 Pet. 498, 516, 517; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; see *Brewer-Elliott Oil Co.* v. *United States, supra*, 88; *United States* v. *Utah, supra*, 75. The construction of grants by the United States is a federal not a state question. *Packer* v. *Bird*, 137 U. S. 661, 669, 670; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 54; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186, 196, and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances. See *Oklahoma* v. *Texas, supra*, 594, 595; *Utah Power & Light Co.* v. *United States*, 243

U. S. 389, 404. In construing a conveyance by the United States of land within a state, the settled and reasonable rule of construction of the state affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted." (*United States* v. *Oregon*, Orig. No. 13, Dec. Apr. 1st, 1935.)

At page 46 of respondents' brief it is alleged that the "State of Oregon *early* construed the Desert Land Act to eliminate riparian rights with respect to lands in this State patented after March 3, 1877." "*Early*" means shortly after March 3, 1877. The first reference in the Oregon decisions to such a construction of the Desert Land Act was made in *Williams* v. *Altnow*, 51 Ore. 275, *thirty-one years* after the enactment of the Act. Petitioner's patent was issued April 20, 1885.

In *Fall* v. *Cooke*, 19 Ore. 455 (July 1, 1890) the Oregon court was construing a patent issued in March, 1885, within a month of the date of petitioner's patent. While that case was under consideration there came to the attention of the Oregon court, *Sturr* v. *Beck*, 133 U. S. 541, decided March 3, 1890, and the Oregon court followed with approval that case, and which was in accord with a previous Oregon decision of the same term, *Larsen* v. *O. R. & N. Co.*

In *Sturr* v. *Beck*, Mr. Chief Justice Fuller was construing the effect of a patent issued March, 1877, with relation to a conflicting water right. The effect of said decision of this court (as construed in *Fall* v. *Cooke* by the Oregon court), was that the homesteader"s riparian right attached from the date of his settlement provided he obtained patent to the land, and cut off any right to divert a stream of water running through such homestead. We quote in our brief at pp. 61-62.

Mr. Chief Justice Fuller in *Sturr* v. *Beck made no mention of the Desert Land Act* or any reference thereto, but

adhered to the riparian doctrine applicable to lands bordering on non-navigable streams.

A further discussion of the Desert Land Act is to be found in petitioner's brief at pages 183-190.

The California Cases.

At page 68 of petitioner's brief reference is made to the case of *Gin. S. Chow* v. *City of Santa Barbara* and *Peabody* v. *City of Vallejo*, cited in petitioner's brief under the heading "The California Cases." They were so-called because the appellate court cited them, with the exception of the *Peabody case*, which had not been decided when the instant opinion was written. Please see our discussion of the California cases at pages 211-239. We refer to them because respondents make reference to these cases as though they were in support of their contentions. A mere reading of the portion cited is sufficient to show that if the Oregon Water Code were to be construed as having cut off instantly all riparian rights which had not been applied prior to the enactment of the act, it was violative of the Federal Constitution, according to the doctrine of said California cases. Counsel overlook the fact that the State of California in November, 1928, adopted a constitutional amendment to help in the construction of the Water Commission Act of 1913 which tended, by regulation, to impair the vested riparian rights of riparian proprietors. Time and again that court had held that the regulatory statute was violative of the Constitution, hence, as stated in the instant opinion, the adoption of the amendment.

The Nevada and Arizona Cases.

At page 61, respondents cite *Reno Smelting, Milling & Reduction Works* v. *Stevenson*, 20 Nev. 269. We think the following citation from a later Nevada case will show that the Reno case is not in point here.

We make the following quotation from *Steptoe Livestock Co.* v. *Gulley* (Supreme Court of Nevada, Feb. 1931), 295 Pac. 774:

> "The right to appropriate the public waters of Nevada was recognized in this State in the early cases of *Lobdell* v. *Simpson et al.*, 2 Nev. 274, 90 Am. Dec. 537; *Ophir S. M. Co.* v. *Carpenter*, 4 Nev. 534, 97 Am. Dec. 550; *Covington* v. *Becker*, 5 Nev. 281; *Barnes* v. *Sabron*, 10 Nev. 217. And in *Walsh* v. *Wallace*, 26 Nev. 299, 67 P. 914, 99 Am. St. Rep. 692, this court recognized a vested right to water appropriated in territorial days. While it was held in *Vansickle* v. *Haines*, 7 Nev. 249, that the doctrine of riparian rights prevailed in this State, the rule thus enunciated was never fully accepted and was finally unequivocally overruled in the case of *Reno Smelting, Milling & Reduction Works* v. *Stevenson*, 20 Nev. 269, 21 P. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364."

In respondents' brief, pp. 57-8, it is alleged that until the privilege of using the water had been exercised, *respondents are of the opinion* that petitioner had nothing more than a *privilege* that was subject to withdrawal. This opinion is contrary to that expressed by Mr. Justice McBride in *Hanson* v. *Thornton, supra*, a quotation from which concludes petitioner's argument at pp. 307-8 of its brief.

And in support of that belief of respondents, it is then stated, that this was the ruling of the Supreme Court of Arizona in *Boquillas Cattle Co.* v. *Curtis*, 11 Ariz., 128.

This *seems* to be the case under consideration in 213 U. S. 339, and we quote from this court at page 346 because it quotes the Arizona court:

> "By the statutory Bill of Rights, Art. 22, all streams capable of being used for the purposes of irrigation are declared to be public property, and no one shall

have the right to appropriate them exclusively except under such equitable regulations as the legislature shall provide. And then chapter 55, Of Acequias or Irrigating Canals, after again declaring streams of running water public, § 1, enacts that "all the inhabitants of this territory who own or possess arable and irrigable lands shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek, or stream of running water," § 3. By § 4, when such acequias run through the lands of private persons not benefited, the damages are to be assessed by the probate judge in a summary manner, on application of the party interested. § 4. Preference is given to irrigation over other uses. § 5. By § 7 the exclusive right to the water is given to the persons taking out a ditch for agricultural purposes, and a right to damages if the water afterwards is taken for mining. By § 17 precedence is given in time of scarcity to the oldest titles, and by § 25, "the regulations of acequias which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona shall remain as they were made and used up to this day;" and the chapter is to be enforced from the day of publication. There are many more details, but we have recited enough to show that the interpretation given by the court below to the general adoption of the common law by the Howell Code, and the qualifications imposed upon it, were correct." (Citing.)

It will be noted that by the Bill of Rights, Article 22, all streams capable of being used for irrigation are subject to appropriation. Hence under no circumstances is the case in point.

Without further in this investigation we assume that the next case there cited from 229 Ariz. 305 is governed by the same constitutional and statutory provisions quoted from the opinion of this Court.

Actual and Threatened Damage.

At page 64 of respondent's brief is a discussion as to whether or not actual damage has been shown to result from the acts complained of in petitioner's complaint.

Except for the issuance of the injunction still in force, the injury would have been irreparable. The finding of the trial court that no damage *has yet resulted* from the acts complained of (XI, R-73), shows the necessity for the continuance of the injunction and the reversing of the cause. For it is admitted in the pleading, that it is the intention of respondents to immediately remove the rock, shattered by the dynamite, from the blasted area, and to draw down through the opening thus made, some 1400 second feet of water—more than twice the low flow of the stream. And while the injunction in the decree retains the elevation of the water at a height there required, this gives the petitioner *no protection* against resulting damage if the injunction be dissolved.

At page 261 of petitioner's brief is petitioner's "Exhibit 2 and 23." Thereon is shown by the letters "CC" indicated by a line designated by the word *"Reef"*, the location of reefs of rock, irregular in height, which act as a dam, and which would retain a little water so that the stream would trickle through the low places in the reef, leaving barren spots, and river bed between petitioner's line at the thread of the river, and the point to which the thread would have been moved by the sucking into the opening thus made, of practically all of the water in the stream at normal flow.

The result of affirmance of this case is to construe the Water Code as destroying petitioner's vested right to the use of its property for the manufacture of power, in which business it is engaged as a public utility, and to hand over to the cement company, which it now supplies with such

power, the water power naturally abiding with, and a part of petitioner's land. As was said by Mr. Justice Wilbur in the dissenting opinion herein, no case can be found to support such a result. The fact is that the statute is not subject to that construction, and this Court will hesitate to place upon an otherwise constitutional statute, a construction which will make it violate the Federal Constitution. The question was never decided by the Oregon court.

Petitioner requires this water power and would have a right even now under the Water Code to condemn it if the cement company possessed it, and to take it and pay for it, and to use it for public purposes.

Will this Court hold that the cement company, which has not been given the power of eminent domain, which owes no duty to the public with respect to supplying power to consumers, may, upon the bare authority of a State Engineer's permit, confiscate this property without compensation, and take it for private use, when it is held by the petitioner for a public use?

Respectfully submitted,

A. E. Reames,
Counsel for Petitioner.

FILE COPY

In the

Supreme Court of the [illegible]

OCTOBER TERM, 19[illegible]

No. 61[illegible]

THE CALIFORNIA-OREGON POWER COMPANY, a corporation,
Petitioner,

vs.

BEAVER PORTLAND CEMENT COMPANY, a corporation, and
CITY OF GOLD HILL, OREGON, a municipal corporation,
Respondents.

BRIEF RESISTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

Geo. Newbury, Medford, Oregon,
W. Lair Thompson, Portland, Oregon,
Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 612

THE CALIFORNIA OREGON POWER COMPANY, a corporation,
Petitioner,

vs.

BEAVER PORTLAND CEMENT COMPANY, a corporation, and
CITY OF GOLD HILL, OREGON, a municipal corporation,
Respondents.

BRIEF RESISTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner is the owner of Lots 1 and 2, Section 15, Township 36 South Range 3 West of the Willamette Meridian in Oregon, for which a United States Patent was issued in 1885, said lands being situate on the east bank of Rogue River, an unnavigable stream.

Petitioner acquired these lands in 1921 (R. 67) from its predecessor, California-Oregon Power Company.

Respondent, City of Gold Hill, is the owner of Lots 6, 7 and 8 of said section, lying on the west side of said stream.

Respondent, Beaver Portland Cement Company, has an option and lease with said City of Gold Hill (*Exhibit A*, R. 38).

Respondents were engaged in constructing a power plant on their own, or west, side of the thread of the stream when this suit was filed by petitioner, and injunctive process issued.

In 1909 the Legislature of Oregon adopted a Water Code, which is set out in full at pages I to XXXIII of the appendix to the petition for writ of certiorari.

Under the provisions of this Code the State Water Board cited all persons claiming water rights on Rogue River to file with the board statements of claim to water, and the petitioner's predecessor, California-Oregon Power Company, filed its statement of claim for water at two points, and in pursuance thereof received an award by the State Water Board, which was confirmed by a final decree of the Circuit Court in 1919. This award gave the right to the use of water for power in the south half of Section 18, Township 36 South Range 2 West of the Willamette Meridian, at a site known as Gold Ray Dam, situate several miles up the river, from said land of petitioner described in the instant suit, the water to be returned to the stream in the South half of said Section (R. 361); and the right to use water for power purposes in the west half of the northwest quarter of Section 6, Township 33 South Range 3 East of the Willamette Meridian, some fifty miles distant and upstream from the lands of petitioner described in the instant suit (R. 401-402).

The records show no other claim made by Petitioner or its predecessor for use of the waters of Rogue River.

The predecessors in interest of respondent, City of Gold Hill (Neilson & McClure, and Oregon Water and Power Company) also filed claims to the use of the water of Rogue River in said proceedings and were awarded 75 second feet and 220 second feet respectively for power; and thereafter the respondent City further availed itself of the provisions of said Code by applying for and being awarded by the State Water Board of Oregon, under the

provisions of said Water Code, permits to use 1127 second feet of water for power purposes at the point in said stream in controversy in this suit (*Exhibit N*, R. 291).

Though the petitioner acquired its said lands in 1921, it has never done anything toward the establishment of a power plant, nor utilized any of the water or its said land situated in said Section 15 for any power or other development, nor was anything of like nature done by its predecessor.

Respondents, in a former suit instituted by petitioner in 1929, were restrained from constructing a dam across the entire stream with one end of the dam resting on petitioner's said land. Respondents, in 1930, began the construction of a power plant on its (west) side of the thread of the stream, when they were restrained in this suit from further construction. After hearing, the restraining order was dissolved and permanent injunction denied. This ruling was affirmed by the Circuit Court of Appeals for the Ninth Circuit.

We deem petitioner for certiorari is met *in limine* by certain obstacles:

(1) Where the waters of an entire stream course have been adjudicated under the Oregon procedure, and petitioner, a riparian owner, made no claim to water in that proceeding, can he at a date more than ten years subsequent to the decree of adjudication assert a right to the use of the waters of the stream antedating such decree, without claiming through such decree?

(2) Can the owner of land riparian to a stream, but who is making no use of the water on his riparian land, successfully invoke injunctive relief to prevent others from using the water of such stream? and

(3) Are the questions propounded in the petition for certiorari of such general interest as to justify a further consideration by this court?

I. One claiming the right to use the waters of a stream as to which the courts of Oregon, under the method provided by Oregon law, have adjudicated the relative rights of all persons to the use of water, must claim through the adjudication if the claim is based upon a right asserted to antedate the adjudication; years after the adjudication such claimant should not be permitted to assert in the court a right which was not submitted to or asserted in such adjudication.

Vol. 3, Oregon Code 1930, 47-619, 47-620.
Pacific Livestock Co. v. Cochran (1914) 73 Ore. 417, 428, 144 Pac. 668.
In re Waters of Chewaucan River (1918) 89 Or. 659, 680, 171 Pac. 402, 175 Pac. 421.
In re Willow Creek (1925) 119 Or. 155, 184, 237 Pac. 682.
Abel v. Mack (1929) 131 Or. 586, 594, 283 Pac. 8.
Ebell v. City of Baker (1931) 137 Or. 427, 435, 299 Pac. 313.
Pacific Livestock Co. v. Lewis (1916) 241 U. S. 440, 443, 448, 60 L. ed. 1084, 1095, 1096.

We believe the proposition here submitted goes to the very life of the system of adjudication provided by the laws of the State of Oregon, under which rights to the use of the waters of a major portion of the streams of the state have been adjudicated. The plan is for a proceeding *in rem* (*Abel v. Mack* (1929) 131 Or. 586, 594) and is designed to adjudicate the *relative* rights of all claimants to the waters of a stream up to the date of adjudication. The clear purpose of the law is that when the machinery of the state is put into motion, every claimant shall present his claim, and eventually those claims shall be determined by a decree of court which will exclude any future assertion of a prior right to use of the water of that stream if

claim therefor was not presented when the relative rights of all users on the stream were adjudicated. We quote the two pertinent sections of the Oregon Water Code:

"The determinations of the state engineer, as confirmed or modified as provided by this act in proceedings, shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination." (*Section 47-619, Oregon Code 1930*)

"Whenever proceedings shall be instituted for the determination of the rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his claims shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him. Any person, association or corporation interested in the water of any stream upon whom or which no service of notice shall have been had of the pendency of proceedings for the determination of the rights to the use of the water of said stream, and who or which shall have no actual knowledge or notice of the pendency of said proceedings may, at any time prior to the expiration of one year after the entry of the determination of the state engineer, file a petition to intervene in said proceedings. Such petition shall contain, among other things, all matters required by this act, of claimants who have been duly served with notice of said proceedings and also a statement that the intervener had no actual knowledge or notice of the pendency of said proceedings. Upon the filing of said petition in

intervention, the petitioner shall be allowed to intervene upon such term as may be equitable and thereafter shall have all rights vouchsafed by this act to claimants who have been duly served. (*Section 47-620, Oregon Code 1930*).

This Code, with a thorough discussion of its purpose, as we have above outlined, and with due emphasis upon the necessity of presenting claims if they are to be preserved, expressed in this language: "All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding", was approved by this court in the case of *Pacific Livestock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. ed. 1084, and the law upheld as constitutional. This means that barring irreguarity in administration, every interest has had due process of law and equal protection of the laws. The form of tribunal is not controlling. (*Mountain Timber Company v. State of Washington* (1917) 248 U. S. 219; 61 L. ed. 685. *Evanhoff vs. State Industrial Accident Commission* (1915) 78 Or. 503, 516; 154 Pac. 106).

Repeatedly (cases above cited) the Supreme Court of Oregon has ruled that the adjudication of the waters of a stream determines the rights of *all* entitled to claim as of the date of adjudication, and cuts off any rights not presented to the adjudication but later claimed to have been acquired at a date anterior to the adjudication.

In the case at bar the fact that there had been an adjudication of the stream was pleaded (*R. 33*) and respondents asserted their rights in part under that adjudication, and in part under a permit to appropriate filed subsequent to the adjudication, pursuant to the terms of the Oregon Water Law.

Petitioner, however, asserts a right that was not submitted to the court in the adjudication of the relative

rights to the waters of Rogue River, although petitioner's predecessor was party to the adjudication. If the decree, entered as the result of an orderly adjudication of the relative rights to the waters of a stream, does not determine all rights to use the waters of that stream; if anyone claiming a right to the waters of a stream may ignore an adjudication according to the Oregon law and later assert a right without claiming through that decree,—then the Water Code is not only worthless, but it becomes a delusion and a snare.

Water rights on a stream are necessarily *relative*. That which is available for one depends upon the amount rightfully taken by another with priority. As pointed out forcefully by this court in the case of *Pacific Livestock Co. v. Lewis, supra,* the whole purpose of the Code is to obtain an orderly, effective and intelligent adjudication of the *relative* rights in such manner that a record thereof will be made available to all who may be interested in future development. If anyone claiming a right, not through the decree of adjudication, but based upon the acquirement of riparian lands by a predecessor, may enter the Federal Court on the ground of diversity of citizenship and ignore the adjudication of the rights of *all* claimants to the use of the waters of a stream, then we have a situation where there will be one rule governing those who can get access to the Federal Court and another rule governing those residing within the State of Oregon. If this can be done, then the entire adjudication is disturbed and disrupted, and of no value.

We submit that until the petitioner asserts a claim either through the decree adjudicating the relative rights to the use of the waters of Rogue River, or a claim acquired subsequent thereto in the manner provided by the Oregon Code, it should not receive consideration from this court.

We call the attention of the court to the fact that petitioner's predecessor in interest did submit itself to the jurisdiction of the state courts in the adjudication of the relative rights to the use of the waters of Rogue River and was awarded the right to use water at locations other than that involved in this litigation, but filed no claim for water at the location involved here (*R. 361*).

The water code provides for re-opening the adjudication upon proper showing *(Sec. 47-620 Oregon Code 1930)*. The administration board did take jurisdiction. Until the orderly processes provided by law have been invoked, we doubt the right of petitioner to appeal to the courts.

Porter vs. Investors' Syndicate (1932) 286 U. S. 461; 76 L. ed. 1226.

II. The petitioner, regardless of its duty to submit its rights to the adjudication of the Oregon courts when the relative rights to the use of the waters of Rogue River were adjudicated, is not in a position to invoke injunctive relief until it can show irreparable damage.

Blair v. Boswell (1900) 37 Or. 168, 170, 61 Pac. 341.

State of Connecticut v. Commonwealth of Massachusetts (1931) 282 U. S. 660, 673, 75 L. ed. 603, 609.

Kinney on Irrigation and Water Rights, (2d ed.) Vol. 3, Sec. 1597, p. 2906.

Northport Brewing Co. v. Perrot (1900) 22 Wash. 243, 60 Pac. 403.

Brown v. Chase (1923) 125 Wash. 542, 548, 217 Pac. 23, 25.

The undisputed fact is that neither petitioner nor its predecessors in interest in the lands now owned by petitioner, and for which a riparian right is claimed in this litigation, have done anything toward the physical construction of a power plant or other device to make use of the waters of Rogue River at this location. It is true that petitioner now states a desire to build a plant at that location, but the record indicates that such claims have been made by the predecessors in interest of petitioner and by petitioner since 1906 (*R. 27-31*). Like a fire alarm horse who hears the bell, petitioner's desire to build arises only when the respondents here undertake to build a power plant.

Under the general principles of equity, petitioner is not entitled to injuctive relief, and that is what it asks for in this litigation.

This court held in the case of *State of Connecticut v. Commonwealth of Massachusetts, supra,* that a power company which had been granted formal rights to build was nevertheless not in a position through its sovereign state to invoke injunctive relief until it could show that its actual operation had been damaged. Such is the general rule, and the rule in Oregon (cases cited *supra*).

III. A writ of certiorari will ordinarily be refused unless there is a lack of uniformity of decision between the several Circuit Courts of Appeal, or the case involves important questions of public interest.

Hamilton Brown Shoe Co. v. Wolf Bros. & Co., (1915) 240 U. S. 251, 60 L. Ed. 629.

Magnum Import Co. v. Coty, (1922) 262 U. S. 159, 67 L. Ed. 922.

The principle above stated has been repeatedly held by this court and is pointedly expressed in the two cases above cited. Supreme Court Rule 35, in paragraph five, points out the character of reasons which will be considered by this court in exercising its judicial discretion as to granting a writ of certiorari. We seriously doubt whether the record in this case exhibits any of those reasons. The contention of petitioner, while divided into nine "grounds for the allowance of the writ" (*Petition*, p. 5), may really be discussed in two subdivisions: (a) Whether the opinion of the Circuit Court of Appeals is in conflict with the decisions of this court and of the Supreme Court of Oregon and whether the opinions of the latter court are in reasonable harmony, and (b) Whether petitioner has a vested right to have the waters of Rogue River flow by his land undiminished in quantity without putting the same to beneficial use.

(*a*) The suggestion that the decision of the Circuit Court of Appeals is out of harmony with the rulings of the Oregon Court and the ruling of this court with respect to the effect of the Oregon Water Code is, we submit, without merit. The decision of this court to which petitioner refers is the case of *Pacific Livestock Company v. Lewis*, (1916) 241 U. S. 440, 60 L. Ed. 1084, and rests upon the statement of this court in that case that the Oregon Water Code preserves vested rights. However, in that case this court had for consideration the entire Water Code. (We will not quote it here. It is printed in full beginning at page 1 of the *appendix to the petition.*) That Act provides for the preservation of vested rights, but defines a vested right in a riparian owner to be a right to the use of the quantity of water that had been theretofore put to a beneficial use, or the application of which to a beneficial use was then pending (Section 70, *Appendix to Petition*, p. xxix). The de-

cisions referred to by counsel as being controlling decisions of the State of Oregon for petitioner's contention of lack of harmony are not entitled to that designation.

Norwood v. Eastern Oregon Land Co., (1924) 112 Or. 106, 227 Pac. 1111, must be read in light of the fact that it was litigation to enforce a prior decree of the court. In the earlier adjudication of the waters of Willow Creek (*In re Willow Creek*, (1915) 74 Or. 592, 144 Pac. 505) the Eastern Oregon Land Company had claimed as a riparian owner water for the irrigation of approximately 7000 acres of land. Of this area approximately 292 acres had had actual irrigation from overflow of the stream. The court rejected the riparian claim as to all of this land except the 292 acres, although all of the land was riparian to the stream, and limited the riparian right to the amount of water actually put to a beneficial use. After that decree was entered the Eastern Oregon Land Company undertook to change the place of use of the water granted for its 292 acres and was sued by Norwood because Norwood was damaged by that change. What the court was doing in the so-called Norwood case was enforcing the decree entered in the adjudication entitled *In Re Willow Creek, supra*, and was not determining any other question, certainly not any question of riparian rights other than that *as to irrigation* a riparian right is inseparable from the land.

Logan v. Spaulding Logging Co., (1920) 100 Or. 731, 736, 190 Pac. 349, was one of the Oregon "splash dam" cases in which a logging company undertook to "splash" the river by impounding water behind a dam, loading the surface of the impounded water with logs, and then opening the dam and shooting these logs downstream. The plaintiff had a grist mill on the bank of the stream which he and his predecessors had operated for more than fifty years. The "splashing" of the stream flooded his water wheel so that he could not operate his grist mill. This was enjoined. It is worthy of note that this plaintiff's claim

was a claim that was in use when the Water Code was adopted, and therefore came under Section 70 protecting riparian rights in use at the time the Code was enacted.

In each of the above cases (and they are the ones upon which petitioner seems to rely) the Code was strictly applied. The only right, whether riparian or otherwise, preserved under the riparian claim of Eastern Oregon Land Company in the *Norwood* case was the right perfected by actual application of the water to a beneficial use, and the same is true of the *Logan* case.

The fact is that the Supreme Court of Oregon since 1908 has consistently ruled against riparian rights based upon location of land, and not upon user of the water, if the land was acquired after the enactment of the Desert Land Act in 1877; and since 1909 has consistently ruled against riparian rights based upon location alone, regardless of when the land was acquired.

Hough v. Porter, (1909) 51 Or. 318, 399, 95 Pac. 732, 98 Pac. 1083.

In re Willow Creek, (1915) 74 Or. 592, 628, 144 Pac. 503.

In re Hood River, (1924) 114 Or. 112, 157-182, 227 Pac. 1065.

In view of the nature of the *Norwood* and *Logan* cases, *supra*, we think the statement of petitioner under reason 7 (p. 7-8 of Petition) that the Supreme Court of Oregon has made decisions since petitioner acquired his land construing Section 70 of the Water Code "both to have and not to have destroyed vested riparian rights not put to beneficial use before the enactment of the Water Code" is not justified. We are not aware of a single decision of the Supreme Court of Oregon rendered since a date long anterior to the time petitioner acquired its land that upholds a claimed riparian right where the water has not been

put to a beneficial use (excluding from this statement certain riparian rights of wharfage, etc., which do not disturb the use of water by others).

(*b*) We now discuss the question of what is a vested riparian right, and whether the action of the Supreme Court of Oregon in steadily modifying its views as to riparian rights in this state, and the action of the Legislature in defining and limiting a vested riparian right, have deprived petitioner of the equal protecton of the laws or have taken its property without due process of law.

The Circuit Court of Appeals grounded its decision upon the exercise of the police power of the state, and did not follow the reasoning of the Supreme Court of Oregon as to lands acquired after enactment by Congress of the Desert Land Act (1877). In the instant case it should be quite immaterial to petitioner which ground the conclusion is rested on, because petitioner's land was admittedly acquired after 1877.

The suggestion that enactment of the Water Code was not an exercise of the police power (*Point* 8, *Petition* p. 8) must have been inadvertently made by petitioner. The Circuit Court of Appeals emphasized the language of the emergency clause attached to the Water Code as indicative of the necessity of the enactment for the public welfare, but regardless of the emergency clause, the power which the Legislature of a state exercises when it passes a law regulating the method of acquiring, perfecting, preserving and adjudicating water rights is the reserved police power of the state.

3 Kinney on Irrigation and Water Rights (2d ed.), p. 2842.

2 Wiel, Water Rights in the Western States, 3rd ed., p. 1097.

Home Building & Loan Assn. v. Blaisdell, (1934) 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481.

Nebbia v. People of the State of New York, (1934) 291 U. S. 502, 78 L. ed. 940.

While it seems a work of supererogation to argue that the enactment of a law such as the Water Code is an exercise of the police power, we refer to the decisions of this court in the *Blaisdell* and *Nebbia* cases, where there are gathered a long list of illustrations of the exercise of the police power, ranging from acts to protect the public morals by regulating or prohibiting lotteries and sales of intoxicating liquor, and the prevention of nuisances, to legislation to protect the public safety, regulate the highways, promote economic welfare, and to regulate the use of water by riparian owners and others. (*Maginault v. Springs,* (1905) 199 U. S. 473, 50 L. ed. 274.)

It is true that there have been many decisions of the Supreme Court of the State of Oregon dealing with riparian rights. The very earliest of those decisions upheld quite fully the common law doctrine. However, at an early day the Supreme Court of Oregon recognized and sustained water rights by appropriation conveying water to lands that were not riparian to the water course, which immediately constituted a modification of the common law riparian rights, and since an early day the Supreme Court of Oregon has refused to apply the common law doctrine in the manner here demanded by petitioner, to-wit, the right of the riparian owner to have the water flow through or by his land undiminished in quantity, although the riparian owner is not putting the water to beneficial use and his action will constitute a monopoly depriving others of the use of the water.

Without undertaking to review all of the decisions dealing with this subject, we ask the court to consider the case of *In re Hood River,* (1924) 114 Or. 112, 181, 189, 203,

and the review of earlier cases in that decision. At page 162 the court begins a discussion of the history of riparian rights in the State of Oregon, especially with respect to the control by the state over that doctrine. At page 166 the court states that only a modified common law doctrine has prevailed in this state and then, after asserting flexibility and adaptability to be the very essence of the common law, the prevailing opinion, beginning at page 181, has this to say about the power of the legislature to define a vested riparian right:

"It was within the province of the legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor: Kansas v. Colorado, 206 U. S. 46, 94 (51 L. Ed. 956, 973, 27 Sup. Ct. Rep. 655, see, also, Rose's U. S. Notes); Sternberger v. Seaton, 45 Colo. 401, 403 (102 Pac. 168); Clark v. Nash, 198 U. S. 361 (4 Ann. Cas. 1171, 1174, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676); Atchison v. Peterson, 87 U. S. 508 (22 L. Ed. 414); Boquillas L. & C. Co. v. Curtis, 213 U. S. 339 (53 L. Ed. 822, 29 Sup. Ct. Rep. 493); Van Dyke v. Midnight Sun M. & D. Co., 177 Fed. 85 (100 C. C. A. 503); United States v. Rio Grande Irr. Co., 174 U. S. 690, 703 (43 L. Ed. 1136, 19 Sup. Ct. Rep. 770, see, also, Rose's U. S. Notes).

"The statute of this state plainly declares that all waters within the state from all sources of water supply belong to the public: Section 5715 Or. L. This is, of course, subject to the further provision of the act. As we have noted the courts of this state and other states and of the United States have upheld the legislative enactments of this state and other similar statutes. Rights to public waters can be acquired as provided by

the several statutes of this state: Cookingham v. Lewis, 58 Or. 484, 490 (114 Pac. 88, 115 Pac. 342); Caviness v. La Grande Irr. Co., supra.

"Under our present statute, defining what shall constitute a vested right of a riparian proprietor, the claim of the Pacific Power & Light Company as a riparian owner of land on Hood River to a continuous flow of the specified quantity of water over its land cannot be maintained."

It is interesting, in considering this case, to refer to the two special concurring opinions. Chief Justice McBride, in concurring, had this to say about a vested right and the section of the Water Code defining it (114 Or. 189):

"It is difficult exactly to define in what a vested right in the use of water consists. Practically, there is no such a thing as property in the water of a flowing stream. The riparian proprietor may own the banks, and even the bed of a non-navigable stream, but he no more owns the water than he owns the air. His only right is the right of using it. In this country we have ceased, to a great extent, to apply, in its original severity, the common-law doctrine, 'Water runs, and it ought to run as it is accustomed to run.' This maxim, while very convenient in expression, was never in fact practically applied in common law to its full extent.

"The riparian rights to water, or to the use of water, may be divided into two classes—natural uses, and other uses which may be deemed extraordinary. Natural uses, which I deem to be those that vest in a riparian proprietor at the very moment that he obtains title to land bordering on a natural stream, include the use of water for domestic purposes of his home or farm, such as drinking, washing or cooking, or for his stock. These might well be construed to extend to all culinary and household purposes, even to the watering of a garden

and things of that character, and, so far as irrigation is concerned, the watering of a small garden is about the extent of use to which any kind of irrigation was put at the time of the common law. All other uses are extraordinary, and may be classed rather as privileges than as rights, and, as to such, I do not believe the theories of the common law should be applied.

"All confess that the common-law theory of riparian rights has been modified in this country in many respects, either by legislation or by holdings of the courts declaring it inapplicable in some particulars to conditions in this country, and the fact that such modifications have been upheld by the courts strongly indicates that, except as to the natural uses before mentioned, no constitutional right to the enjoyment of the flow of a stream exists, but that the use in these extraordinary respects is in the nature of a mere privilege, over which the legislature has jurisdiction.

"As to manufacturing and the use of water by dams, it does not seem to me that it ever arose in this country above the dignity of a mere privilege, over which the legislature had complete control. This is especially true of mills. Very many of the decisions, in referring to a mill site, speak of it as a 'mill privilege'."

Mr. Justice Coshow, also specially concurring, defined a vested right in this manner (114 Or. 203):

"Every riparian owner, to a certain extent, has a vested property right. By being the owner of the bank, he has access to the water and to its use for any lawful purpose. To the extent he has used it, that use of it is a vested property. To that extent, it may be said he has applied the water to a beneficial use. It may be truthfully said, to that extent, he has appropriated the water.

The use of water, therefore, has become a vested, fixed and valuable property right. The doctrine of the Dartmouth College Case, 17 U. S. (4 Wheat) 518 (4 L. Ed. 629, see, also, Rose's U. S. Notes), protects such property against the invasion by the state either acting through its Constitution, legislative enactments, or judicial decisions. The right to have the water flow by and through his premises, undiminished in quantity and unimpaired in quality, in the opinion of the writer, is not such a vested property."

That the state may with propriety amend its laws with respect to riparian rights cannot be seriously questioned.

"But the laws in respect of riparian rights that happen to be effective for the time being in both States do not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented. The rules of the common law on that subject do not obtain in all the States of the Union, and there are variations in their application. The doctrine of appropriation prevails in some States. And every State is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise. United States v. Rio Grande Irrig. Co., 174 U. S. 690, 702, 43 L. ed. 1136, 1141, 19 S. Ct. 770."

State of Connecticut v. Commonwealth of Massachusetts, (1931) 282 U. S. 661, 670, 75 L. Ed. 603, 607.

We suggest that petitioner is not in a position to assert a property right in a decision of the court not dealing with the specific property which petitioner owns, but discussing general principles always subject to change. Petitioner

could not place reliance upon decisions of the Supreme Court of Oregon from which that court had departed in later decisions.

Oliver Co. v. Louisville Realty Co., (1913) 156 Ky. 628, 161 S. W. 570, 51 L. R. A. (N. S.) 293.

The only exception to the rule that an overruled decision never was the law is where a contract is made in reliance on a decision construing a statutory or constitutional provision.

7 *R. C. L.* 1010.

Mason v. A. E. Nelson Co., (1908) 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221.

Remembering that petitioner acquired its lands involved in this litigation in the year 1921, we say that prior to that date the Supreme Court of Oregon had handed down a number of decisions modifying the common law pertaining to riparian rights—decisions which pointed out that there are various kinds of riparian rights; that the riparian claim to water for irrigation is inseparable from the land, but the riparian claim for wharfage rights, the right to build power houses, water wheels, etc., may be sold separately from the land. (*Coquille Mill & Mercantile Co. v. Johnson*, (1908) 52 Or. 547, 98 Pac. 132; *Pacific Elevator Co. v. Portland*, (1913) 65 Or. 349, 398, 133 Pac. 72.) The court had ruled in favor of a common law riparian right limited to the use of water for domestic purposes, stock water and garden irrigation, and had definitely ruled against the existence of a riparian right to control or have flow past one's land the body of the stream without use. In the case of *Williams v. Altnow*, (1908) 51 Or. 275, 95 Pac. 200, 97 Pac. 539, the court first called attention to the provisions of the Desert Land Act enacted by Congress and suggested that the language was broad enough to put an end to riparian rights for lands acquired after 1877. In

Hough v. Porter, (1909) 51 Or. 318, 399, 95 Pac. 732, 98 Pac. 1083, the Supreme Court of Oregon passed an opinion definitely holding against riparian claims for lands acquired after 1877. In the course of that opinion, at pages 410-411 of 51 Oregon, the court reviews a long list of earlier decisions of the Oregon Supreme Court, where claims had been based upon riparian rights, and holds that in none of them did the date of initiation of title appear to have been after 1877.

We particularly ask the court to note that the Supreme Court of Oregon in this case, beginning at page 408 of 51 Oregon, discussed the case of *Stur v. Beck,* 133 U. S. 541, 33 L. ed. 761, upon which petitioner so much relies in the case at bar, and points out that this court later ruled that the courts of each state had the power to determine the common law and its applicability for that state.

In 1909 the Oregon Water Code was enacted, defining the vested right of a riparian owner as the right to use the amount of water that had been theretofore applied to a beneficial use, or the application of which was then in process. In 1916 this court passed its opinion in *Pacific Livestock Company v. Lewis,* 241 U. S. 440, 60 L. ed. 1084, sustaining this Oregon Water Code. In 1915 the Supreme Court of Oregon passed its opinion definitely limiting the vested right of a riparian owner whose title was initiated prior to 1877 to the amount of water put to a beneficial use prior to adjudication.

In re Willow Creek; 74 Or. 592, 628, 144 Pac. 505.

Title to the lands of petitioner was initiated in 1885, after the enactment of the Desert Land Act. Petitioner in 1921, after all of these court decisions and this legislation, purchased its land. In 1924 the court passed its decision *In re Hood River,* 114 Or. 112, 227 Pac. 1065, in which it upheld Section 70 of the Water Code. That this decision upholding the law of 1909 was not handed down

until 1924 wouldn't affect the validity of the law or its binding effect upon petitioner. (*Ross v. Oregon* (1912) 227 U. S. 168, 57 L. ed. 458, 463).

In 1919 the Circuit Court of the State of Oregon for Jackson County (where petitioner's land is located) passed its decree in a proceeding to adjudicate the relative rights of all claims to the use of the waters of Rogue River and its tributaries (*Defendant's Exhibit O—R. 361*), in which it decreed certain rights to the predecessor of respondent here and certain rights to the predecessor in interest of petitioner, but decreed no rights appurtenant to the land of petitioner now in litigation and for which no right was claimed in said adjudication. The Rogue River adjudication reached the Supreme Court of Oregon (124 Or. 7). As suggested earlier in this brief, a water adjudication under the Oregon Water Code is *in rem*, and every inch of land riparian to the stream under adjudication is called upon to assert its claim, if it has any. Petitioner's land is riparian to Rogue River. The effect of the adjudication, without award to petitioner's land, is a decree that petitioner's land has no water right.

In view of this series of decisions, one at least negatively affecting the specific land for which petitioner is now claiming a water right, is it possible that petitioner can be heard to say that its land was purchased in 1921 in reliance upon a riparian right to have the full flow of the stream go past its land without use?

We submit the petition for writ of certiorari should be denied.

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SUBJECT INDEX

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STATEMENT 1

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STATEMENT

Involved in this proceeding is the question of the existence in the State of Oregon of a right, because of ownership of land riparian to a non-navigable stream, to have the flow of the stream, without material impairment in quantity or quality, without use and without submitting the claimed right to an adjudication of the relative rights to the use of the waters of the stream held in conformity to Oregon laws, despite legislation limiting riparian rights to the amount of water put to a beneficial use at the time of the legislation (1909).

Rogue River, the use of the waters of which is the bone of contention, rises at an altitude of about 5,000 feet on the western slope of the Cascade Mountains in Oregon, near Crater Lake, and flows southwesterly to the Pacific Ocean. Its drainage area is approximately 5,000 square miles; its length is approximately 210 miles. (*Appendix 44.*) The mountains in which the river rises are rough, wooded, and the annual precipitation there is 50 to 75 inches. After leaving the Cascade Mountains the river flows through one of the semi-arid, but with irrigation richly productive, valleys of the state (Rogue River Valley); thence through the Coast Range of mountains to the ocean. In both ranges of mountains the Rogue River provides excellent power sites because of the rugged country and heavy fall of the water. The mountainous districts through which the stream flows are rich in minerals and the waters of the stream are used for mining purposes. Rogue River Valley is one of the famous fruit producing districts of the state, the Valley being particularly noted for its pears. Precipitation in the Valley is low, and irrigation is necessary for satisfactory production. At its mouth Rogue River is wide, of fair

depth and navigable for power boats. Along the course of the stream are pleasure resorts where riparian owners rent the privilege of bathing, boating and fishing. The stream is the famous habitat of the sporty Steelhead. Thus the stream presents, in the purposes for which its waters may be used, practically every beneficial use of water. Likewise it presents variations in climatic conditions. Near its mouth, west of the Coast Range of mountains, the climate has the moisture that goes with the ocean littoral of Oregon. Through the rich agricultural district of the Rogue River Valley the land is semi-arid and requires irrigation, while in the Cascade Mountains where the river has its rise there is again heavy precipitation.

Petitioner is the owner of Lots 1 and 2, Section 15, Township 36 South of Range 3 West of the Willamette Meridian, in Jackson County, Oregon. The land is riparian to Rogue River. It was patented by the United States to Francis Marion Friedenburg April 20, 1885. Through mesne conveyance, petitioner became the owner thereof March 11, 1921 (*R. 67*). Respondent, City of Gold Hill, is the owner of Lots 5, 6, 7 and 8, in the same section (*R. 67*) and is under executory contract to respondent, Beaver-Portland Cement Company, to convey said land and water rights appurtenant thereto (*R. 69*). The terms of the executory contract provide that the City of Gold Hill shall be paid the sum of $22,600 to retire bonds which it issued in payment of the purchase price of said property from its predecessors, and shall receive from Beaver-Portland Cement Company in the city mains water for municipal purposes pumped with a power plant to be constructed by the Cement Company, and shall receive power for municipal use (*R. 42-44*).

The lands of petitioner and respondents are directly opposite each other on the river, the former on the

easterly bank, the latter on the westerly bank. Predecessors in interest of respondents had constructed a small power development which the City purchased.

In 1919, as the result of an adjudication of the relative rights to the use of the waters of Rogue River, a decree was entered adjudicating to predecessors in interest of respondent, City of Gold Hill, the use of 270 cubic feet per second of water for power purposes (*R. 68*), and thereafter the City of Gold Hill applied to the State Engineer for and received a permit to appropriate additional water to the amount of 1,127 c.f.s. (*R. 69*). This total of 1,397 c.f.s. is under contract to respondent, Beaver-Portland Cement Company.

The first claim that the lands of petitioner were valued as a power site was made by a predecessor in interest, Condon Water & Power Co., in 1906 (*R. 71*). That predecessor never made any use of the water (*R. 72*). California-Oregon Power Company was the immediate predecessor of petitioner, *The* California-Oregon Power Company (*R. 70*). Petitioner was organized in 1920 (*R. 188*). No use of the water has ever been made by the petitioner herein or its predecessors, nor did petitioner's predecessors request an adjudication of a right to use the waters of Rogue River at this point when the relative rights to the use of the waters of this stream were adjudicated under the Oregon law, although the immediate predecessor in interest of petitioner was a party to the adjudication, claimed water at another location on Rogue River about three miles above the location presently involved, and was decreed a right by appropriation at the upper location (*R. 70*).

In 1928, acting under the above mentioned executory contract between the two respondents here, respondent Beaver-Portland Cement Company began the construc-

tion of a wing dam in Rogue River, and the petitioner here brought suit in the federal court to enjoin the construction (*R. 391*). This litigation resulted in a decree (*R. 473*) pursuant to a decision of the Ninth Circuit Court of Appeals (35 F. (2d) 317) affirming the right of respondents to maintain a crib 10 feet wide and 80 feet long on Lot 1 of Petitioner's property, and specifically reserved the question of water rights for future consideration.

On July 21, 1930, pursuing the construction of its diversion works for the development of power, respondent Beaver-Portland Cement Company discharged some shots to remove obstructing reefs on its own, or westerly, side of Rogue River (*R. 72*), when the present suit was filed and restraining order issued. This work was entirely on respondents' own, or westerly, side of the stream, and did not remove any lateral support from the property of petitioner, nor damage petitioner's property in any manner (*R. 73*).

In its decree the trial court carefully preserved petitioner's natural rights as a riparian owner to have sufficient water flow across its land for domestic and stock purposes and garden irrigation (*R. 74*), but held that petitioner did not have further rights to the use of the waters of Rogue River at this location.

In its appeal petitioner assigned errors referring only to the court's legal conclusions from its findings of fact, and did not question those findings (*R. 83*). The Circuit Court of Appeals accepted the findings of the lower court, but based its conclusion upon different reasoning than that employed by the trial court (*R. 411*).

In this state of the record we understand this court accepts the findings approved by two courts: *Boehmer v. Pennsylvania R.R. Co.* 252 U.S. 496, 64 L. ed. 680

(1919); *United States v. State Investment Co.*, 264 U.S. 206, 68 L. ed. 639 (1923); *Bodkin v. Edwards*, 255 U.S. 221, 65 L. ed. 595 (1920); *Washington Securities Co. v. United States*, 234 U.S. 76, 58 L. ed. 1220 (1913).

Petitioner suggests rather heatedly that respondents are believers in violence, and resort to dynamite instead of the courts. Respondents feel quite clear on the record. Petitioner's predecessor was party to a general adjudication of the relative rights to use the waters of Rogue River, and claimed no right at the location of petitioner's land. An early litigation had upheld the right of respondent's predecessor to build a dam to a pier on petitioner's land, but denied the right to cross the entire watercourse with the dam. The Circuit Court of Appeals decided that the right to maintain the pier continued but that the right to build to it on petitioner's land had been lost (35 F. (2d) 317) and on December 29, 1929, pursuant thereto the trial court entered its decree (*R. 176*). Respondent, proceeding in accordance with Oregon law, acquired the right to construct a power plant and a permit to use the water of Rogue River to develop the power. Perfection of this permit required diversion of the water. This was undertaken entirely on respondent's land. Petitioner, who had claimed no water right at the adjudication, is not in a position to assert that respondent should have sued petitioner for *another* water adjudication before beginning construction. The opinion of the Court of Appeals was interpreted as suggesting that if petitioner claimed a water right it should assert that right through the state's adjudication machinery (*R. 63*), and ample time was given petitioner to apply for such adjudication before respondent began constructing its diversion channel.

We have printed as an appendix to this brief material which we deem pertinent and which is not included in the appendix to petitioner's brief. We have avoided duplication and will refer to the appendix to petitioner's brief for matters printed therein.

Oregon Court Exercised Good Faith

Preliminary to presenting our summary and brief we suggest a lack of warrant for the charge of bad faith against the Oregon Supreme Court which seems to be a theme running through petitioner's brief. The contention is offered that a sort of a conspiracy existed in the Oregon court to (1) mislead the Supreme Court of the United States into approving the Oregon water code, and (2) lull all owners of land riparian to the streams in Oregon into a sense of safety as to unused but claimed rights (*See Pet. Brief, pp. 27, 28, 108-109, 331*). While the Supreme Court of Oregon probably needs no defense at our hands, we express the view that all courts are inherently honest and that no court could work out a plan throughout the years, with the changing membership of the court, such as is suggested. If so, the Oregon court has done an enormous wrong, because many of the streams of the State of Oregon have been adjudicated, the acreages of irrigated land alone exceeding one million, of which over 34,000 are supplied with water from Rogue River. (*Appendix, p. 48*). Petitioner's argument is based entirely upon a misconception of the opinion of the Supreme Court of Oregon in the case of *In re Willow Creek*, 74 Or. 592, 144 Pac. 505, 146 Pac. 475 (1915). The argument repeated and reiterated in petitioner's brief is that in this case the Supreme Court affirmed all of the claimed common law riparian rights and never thought of construing the water code to limit

those rights to the water that had been theretofore put to a beneficial use or was in process of being put to a beneficial use at the time the water code was enacted in 1909. From this erroneous conclusion is built up the argument that the court continued to rule that the idle water theory should prevail in Oregon until the decision in the Hood River case in 1924, and that because of this, which petitioner calls "assurances" to the Supreme Court of the United States, that court was induced to approve the water code in the case of *Pacific Livestock Co. v. Lewis,* 241 U.S. 440, 60 L. ed. 1084 (1916). We credit this court with reading the case of *In re Willow Creek, supra,* more carefully than did petitioner. In that case it clearly appeared that the Eastern Oregon Land Company claimed as a riparian owner water for 7,000 acres of land. We quote from page 608 of 74 Oregon:

> "This company is a California corporation and the owner of a large amount of land in the watershed of Willow Creek, a description of which is set out in this appellant's claim. The main channel of Willow Creek passes through about 7,000 acres of these lands particularly described in the record, all of which the Eastern Oregon Land Company alleges to be riparian to the stream."

Thereafter follows a discussion of all of the facts that constitute riparian ownership, an extensive review of the decisions in the State of Oregon and from other states with reference to water rights based upon claims of various character; then it is pointed out that the Eastern Oregon Land Company claimed by appropriation for 216.5 acres (74 Ore., p. 609), and then the court allowed on the claim for its 7,000 acres based upon a riparian right just 292.02 acres on which the

water had actually been used (74 Ore., p. 621). In this state that was an historic decision because it, for the first time, applied the water code of 1909 actually limiting a riparian right to the amount of water that had been put to a beneficial use before enactment of the code. That may be justification for the lengthy discussion of the development of water law in Oregon which appears in that case. We submit, however, that the *point decided* is the controlling thing and not the kind or length of discussion, and the point decided was that the Eastern Oregon Land Company's riparian claim would be limited to the amount of water put to beneficial use. So, instead of the Supreme Court of Oregon undertaking to mislead the world as to what it proposed to do some years later, it did at the first opportunity apply the Oregon water code just as it later applied it in the Hood River case.

SUMMARY

I. A riparian owner may not ignore an adjudication of the relative rights to the use of the waters of a stream under the Oregon practice and then at a later date assert a right antedating the adjudication.

It is not a question of *res adjudicata*, but a question of the method of asserting a water right where the rights to the use of the waters of a stream have been adjudicated.

The proceeding is *in rem*, and a single claimant on a stream must claim all of his rights either as an appropriator or as a riparian owner. Petitioner's predecessor claimed and was awarded a right by appropriation and did not claim and was not in a position to claim a riparian right.

II. The common law doctrine that the owner of riparian land may insist that the waters of the stream flow by his land unused by himself and to the exclusion of use by others has never been adopted in Oregon. Neither the legislative nor the judicial history of the State of Oregon will sustain the contention that the policy of this state has built up a rule of property sustaining the idle water doctrine.

The common law doctrine of riparian rights and the doctrine of non-riparian use are so opposed that the adoption of the latter is an immediate departure from the former. The State of Oregon early adopted laws for the appropriation of water and never, prior to patent from the United States to petitioner's predecessor in interest, did the Supreme Court of Oregon determine that the common law of riparian rights should be the rule in this state. After the issuance of patent to petitioner's predecessor, the water law of Oregon was in a state of flux until the Water Code of 1909 definitely limited water rights to such as had been put to a beneficial use prior to its enactment, or to such as might be thereafter acquired in conformity with the provisions of the Code. At all times beneficial use has been the measure of right and never has the court as a litigated question sustained the doctrine of continuous flow without use. Prior to March 11, 1921, when petitioner acquired its land, there was neither court decision nor legislation in Oregon to justify the contention that a rule of property had been established upon which petitioner could rely.

III. The Desert Land Act, passed March 3, 1877, by reserving for appropriation all waters of non-navigable lakes and streams upon all PUBLIC LANDS, put an end to riparian claims to water flowing through lands patented after the date of the act.

IV. The Oregon Water Code of 1909 did not deny to petitioner equal protection of the law or take its property without due process of law.

(1) The act carefully preserves any water right initiated prior to its enactment. To classify riparian owners into those who had put water to a beneficial use, those who had claimed a right under any prior existing laws, and those who are merely riparian to the stream but have done nothing toward use of the water, was a reasonable classification to bring about development for the general public good.

(2) The Constitution of Oregon, carrying forward laws in force in the territory until such laws should be altered or repealed, did not make a part of the law of Oregon the idle water theory of the common law and did *reserve* the right to withdraw the privilege of using water where that privilege had not been exercised before the withdrawal. In short, there could be no vested right under this constitutional provision until the water had been put to a beneficial use.

V. Without a vested water right and with no damage to its side of the stream by the operations of respondent, and with a decree requiring respondent to always maintain the water at a level that will supply water on petitioner's side of the stream, petitioner has shown no damage that would justify injunctive relief.

I.

A RIPARIAN OWNER MAY NOT IGNORE AN ADJUDICATION OF THE RELATIVE RIGHTS TO THE USE OF THE WATERS OF A STREAM UNDER THE OREGON PRACTICE AND THEN AT A LATER DATE ASSERT A RIGHT ANTEDATING THE ADJUDICATION.

After an adjudication each claimant to the use of water must claim either through the adjudication or upon a permit from the State Engineer subsequent to the adjudication. The Oregon Water Code of 1909 provides in Sections 33 and 34 (*Appendix to petitioner's brief, pp. 13-14*), that when the State Engineer has ordered an adjudication of the waters of a stream and that adjudication has proceeded to the final order determining relative rights of the various claimants, it shall be conclusive of "all prior rights and the rights of all existing claimants"; also that it shall be the duty of all persons interested in the waters of a stream to submit proof of their respective claims at the adjudication, and "any such claimant who shall fail to appear in such proceeding and submit proof of his claims shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceeding, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him."

There was an adjudication of the relative rights of all claimants to the use of the waters of Rogue River (*R. 68*) and the owner of the land now claimed by petitioner did not request that a water right at this location be adjudicated to such owner (*R. 70*). The constitutionality of this method of determining water rights, and particularly of the provisions of the Oregon Water Code above referred to, was upheld by this court in the case of *Pacific Livestock Co. v. Lewis*, 241 U.S. 440, 60 L. ed. 1084 (1916). The Supreme Court of Oregon has repeatedly construed the Oregon Water

Code to require all claimants to assert their rights at an adjudication and to bar any right antedating the adjudication not claimed therein .(*Pacific Livestock Co. v. Cochran,* 73 Or. 417, 428, 144 Pac. 668 (1914); *In re Waters of Chewaucan River,* 89 Or. 659, 680, 171 Pac. 402, 175 Pac. 421 (1918); *In re Willow Creek,* 119 Or. 155, 184, 237 Pac. 682 (1925).

We submit that under this construction of the Oregon Code when an adjudication is once found to have been held, no water claimant can assert a right, riparian or otherwise, except through the adjudication or based upon a permit issued by the State Engineer after the date of the adjudication, in accordance with the Water Code.

It is not a question of *res adjudicata,* it is a question of the force of the statute in limiting water rights, or the manner of establishing or asserting water rights, and we say it was competent for the legislature to so prescribe the manner in which a water right must be established. Any other rule would be destructive of the efficacy of the Water Code. It is to determine *relative* rights. If any claimant can ignore the adjudication and thereafter claim rights antedating the adjudication, the purpose of the adjudication is destroyed. The right of the state to require that all claimants submit their claims has been upheld in other states than Oregon and specifically applied to rights that were claimed to have been initiated long prior to the adjudication: *Humboldt Land & Cattle Co. v. Allen,* 14 F. (2d) 650, 654, 274 U.S. 711, 71 L. ed. 1314 (1927); *O'Neil v. Northern Colorado Irrigation Co.,* 242 U.S. 20, 61 L. ed. 123, 129 (1916). To compel each claimant to assert his right through the adjudication does not in any way impair his right, does not impose heavy burdens, and is a fair regulation imposed upon all water claimants alike.

The proceeding is in rem.

It was suggested in the dissenting opinion of Judge Wilbur that petitioner claimed it was not a party to the adjudication. In so far as petitioner was organized as a corporation in 1920 (*R. 188*), and the adjudication reached decree in the Circuit Court in 1919 (*R. 68*), it is quite clear that the petitioner, by name, could not have been a party to the adjudication. It is just as clear, however, that the predecessor in interest of petitioner was a party to the adjudication. We do not know why the corporation which was called California-Oregon Power Company prior to 1920 became *The* California-Oregon Power Company in the year 1920. We do know, however, that the former was the immediate predecessor of the latter (*R. 70*) and that California-Oregon Power Company was a party to this adjudication, and was awarded a water right. The proceeding is in rem (*Abel v. Mack*, 131 Or. 586, 594, 283 Pac. 8 (1929). Both the riparian land and the owner of it, as predecessor in interest of petioner, were respectively involved in and a party to the adjudication. Undoubtedly the adjudication would bind those who succeed to the interests of parties to the adjudication, and we say also as to those who purchase land which was subject to the adjudication, its effect could not be destroyed by the mere process of purchasing property after the adjudication from one who declined to present a claim for water at the adjudication. If this could be done there would be an endless process that would prevent an adjudication ever being final as to the *relative* rights of the users of the waters of the stream.

Petitioner's predecessor could not claim as a riparian owner at this location.

A further reason is found in the Oregon practice why a riparian right can not be asserted at the location of petitioner's land in the present proceeding. Whether wise or not, it is the established rule in Oregon that a claimant to the use of the waters of a stream must base his right either upon claims by appropriation or claims based upon the riparian location of his land and the application of the water to a beneficial use: *Williams v. Altnow*, 51 Or. 275, 300, 95 Pac. 200, 97 Pac. 539 (1908); *Cavincss v. LaGrande*, 60 Or. 410, 421, 119 Pac. 731 (1911). The court has construed this rule to permit different claimants upon the same stream to assert rights of a different nature but have insisted that the same claimant must assert all rights either by appropriation or by riparian ownership. California-Oregon Power Company, the immediate predecessor of petitioner, asserted and was adjudicated a right by appropriation to the use of the waters of Rogue River in developing power at a point three miles above the location presently involved (*R. 70*). Having thus asserted a right by appropriation in the same location, that predecessor waived claims to the use of the waters of the same stream by virtue of riparian ownership. Confronted with this necessity of election under the water doctrine enforced by the Supreme Court of Oregon, the predecessor doubtless elected the more certain right by appropriation. We submit that neither the said predecessor nor its successor, the petitioner herein, is in a position to now assert the riparian right presented in this litigation.

Furthermore, the Oregon Water Code (*Section 34, Appendix to petitioner's brief, pp. 13-14*) gives ample time for any water user who may not have been personally served with notice, or who did not have actual

notice, to intervene and set up any claim to the use of the water of a stream. The State Engineer as an administrative board took jurisdiction of the matter and proceeded therewith. To that board petitioner should first go (*Porter v. Investors Syndicate,* 286 U.S. 461, 76 L. ed. 1226 (1932).

Petitioner would avoid the effect of the water code requiring all claimants on a stream to submit to an adjudication when one is ordered, upon the assertion that, because subdivision 8 of Section 70 of the water code (*Appendix to Pet. brief, p. 31*) requires all rights granted or declared by the act to be adjudicated in the manner provided in the act (Pet. brief, p. 29), and because of language used by the Supreme Court in the decision of *In re Willow Creek* with reference to those personally served with notice but not appearing, petitioner was not required to submit its riparian claim (Pet brief, pp. 179-182). Petitioner has not favored the court with information as to whom of its predecessors owned the land now claimed by petitioner at the time of the adjudication of the relative rights to the waters of Rogue River. It appears, however, that petitioner's predecessors were not among those served and *who failed to appear* (*R. 399*) and that at least the immediate predecessor was a party to the adjudication (*R. 70*). Regardless of this, we submit that petitioner's construction of the water code is entirely too narrow. If it be conceded for argument that Section 70 of the water code (*Appendix to Pet. brief, p. 29*) does indeed recognize, create or grant or declare some right in riparian owners, it does not follow that subdivision 8 of that section, providing that all rights granted or declared by the act shall be adjudicated as other rights, limits the adjudication to the rights so granted or declared. A reference to the act

in its entirety puts beyond reasonable argument any such contention. Section 11 of the water code (*Appendix to Pet. brief, p. 4*) provides that upon proper showing the Board of Control shall determine *relative* rights of various claimants to the use of the waters of a stream. Section 12 provides for notice by publication of the beginning of an investigation of the stream by the State Engineer. Section 13 provides for a notice by registered mail to those known to be in a position to claim the use of water. The fact that *relative* rights are to be determined and that this determination covers not only claimants by appropriation but all claimants, makes it certain that the legislature never contemplated that anyone could sleep on their rights as a riparian owner and decline to submit to the adjudication. Section 24 (*Appendix to Pet. brief, p. 10*) provides that the order of determination shall establish the "several rights" to the waters of a stream. Section 25 makes it clear that it covers not only rights for irrigation but all other rights, as it specifies certain additional information to be included in the water right certificate if the water is for irrigation. So we say as to said first contention of petitioner that the adjudication is not confined to those rights that are granted or declared in the code.

With respect to the asserted privilege of petitioner to exclude itself from the adjudication because it was not personally served with notice, we think this is not what is contemplated by the water code. The language of the Supreme Court of Oregon in the case of *In re Willow Creek* (p. 618, 74 Or.), asserted in petitioner's brief as construing the act to permit those not served with personal notice to escape the effect of the adjudication, we believe falls short of the contention offered by petitioner. The portion of the water code under discussion at that point is Section 34. The code clearly

divides the persons affected by the section into two classes, (1) those who are served with personal notice *or have knowledge of* the adjudication, and (2) those who do not have such knowledge. As to the first class, the court says "any such claimant" who fails to submit his proof would include only those who were duly served with process, but as to the second class, they would not be bound by the decree for the period of one year and would have that time in which to petition to intervene. Such is the clear meaning of the water code and we think a proper interpretation of the court's language in the case of *In re Willow Creek, supra.*

However, petitioner on this score could not escape the effect of the adjudication because it appears that petitioner's predecessor, California-Oregon Power Company, was a party to the adjudication, was awarded a water right by appropriation on the stream, and being a party to the adjudication would be bound to present all of the claims that it had.

II.

THE COMMON-LAW DOCTRINE THAT THE OWNER OF RIPARIAN LAND MAY INSIST THAT THE WATERS OF THE STREAM FLOW BY HIS LAND UNUSED BY HIMSELF AND TO THE EXCLUSION OF USE BY OTHERS HAS NEVER BEEN ADOPTED IN OREGON. NEITHER THE LEGISLATIVE OR JUDICIAL HISTORY OF THE STATE OF OREGON WILL SUSTAIN THE CONTENTION THAT THE POLICY OF THIS STATE HAS BUILT UP A RULE OF PROPERTY SUSTAINING THE IDLE WATER DOCTRINE.

The common-law appropriated from the civil law the rule embodied in the phrase *"aqua currit et debet currere ut currere solebat."* The phrase has probably rolled off the judicial pen of some writer of opinions in every state in the land; often in cases so narrow in the issues involved as to inhibit a fair claim that the

use of the Latin sentence or its English translation in the course of the court's argument established a general rule of property; more often in cases dealing with nuisance—abuse in the use of water.

Respondent believes that neither the legislative nor the judicial history of Oregon justifies the contention of petitioner that the above-mentioned common-law rule became the settled policy of the State of Oregon so that petitioner or its predecessors in interest did or could rely on it as a rule of property.

The common-law doctrine of riparian rights and the doctrine of non-riparian use of water are so opposed that the recognition of the latter is an immediate departure from the common law.

The common law reserved to riparian owners the use of flowing water. To permit use by non-riparian owners was not the common law. (*Mettler v. Ames Realty Co.*, 61 Mont. 163, 201 Pac. 702, 705 (1921).)

The Ninth Circuit Court of Appeals has announced the point clearly:

> "The common-law doctrine of riparian rights being wholly inconsistent with and antagonistic to that of appropriation, it necessarily follows that when the federal and state governments assented to, recognized, and confirmed, with respect to the waters upon the public lands, the doctrine of appropriation, they in effect declared that that of riparian rights did not apply. The doctrine of appropriation thus established was not a temporary thing, but was one born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the status of water rights with respect to public lands." *Van Dyke v. Midnight Sun Mining & Ditch Co.*, 177 Fed. 85, 91 (1910).

The Oregon Court has recognized the force of the antagonism between the doctrines, and while administering a modified common-law rule has said a claimant to the use of the waters of a stream may not claim both as a riparian owner and as an appropriator.

Low v. Schaffer, 24 Or. 239, 246, 33 Pac. 678 (1893).

Williams v. Altnow, 51 Or. 275, 300, 95 Pac. 200, 97 Pac. 539 (1908).

Cavincss v. LaGrande Irrigation Co., 60 Or. 410, 421, 119 Pac. 731 (1911).

The decision of what the policy of the State of Oregon may be as to the use of water rests with the State of Oregon.

Claimants for riparian rights have been wont to cite *Sturr v. Beck,* 133 U.S. 541, 33 L. ed. 761 (1890), as holding that a patentee of the government acquires riparian rights if a stream touches the patented land. The case is not authority for this contention. It merely held that in a state *adhering to the common-law doctrine* (as Dakota then did by statute) the riparian right of the patentee related back to the date of entry or settlement. It is now settled beyond question that each state may determine its own water law, and the extent to which the common law rule of riparian rights will be recognized.

"It" (the State) "may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control." *Kansas v. Colorado,* 206 U.S. 46, 95, 51 L. ed. 956, 973 (1906).

"The effect of riparian rights, if established, would depend upon the local law." *Producers Oil*

Co. v. Hanzen, 238 U.S. 325, 338, 59 L. ed. 1330, 1336 (1914).

"It was long since affirmatively settled that such claim" (riparian rights on navigable waters) "solely involves a question of State law." *Norton v. Whiteside*, 239 U.S. 144, 153, 60 L. ed. 186, 190 (1915).

The same ruling is made as to non-navigable streams where use is claimed for power.

State of Connecticut v. Commonwealth of Massachusetts, 282 U.S. 661, 670, 75 L. ed. 603, 607 (1931).

Both the legislative and judicial history of Oregon establish a policy contrary to the common law doctrine contended for by petitioner.

At once it must be conceded that the law of Oregon proceeds according to the common-law, where suited to our situation and not modified by statute. The organic act of the provisional government of the Oregon Country before statehood provided:

"Sec. 2. The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings, according to the course of common-law." *Deady's Code* 1845, p. 59.

When Congress established the territorial government of Oregon, it continued in force the laws of the provisional government. (*Act of August 14, 1848, Sec. 17, 9 Stat. ch. 177*). Also the Constitution of Oregon adopted by the people September 18, 1857, provided:

"All laws in force in the territory of Oregon when this Constitution takes effect, and consistent there-

with, shall continue in force until altered or repealed." *Const. Oregon; Art. XVIII, Sec. 7.*

The Supreme Court of Oregon has consistently ruled that by virtue of the foregoing provisions the common-law became the law of the state *only* "as far as it was general and not local in its nature and applicable to the conditions of the people * * * except as modified, changed or repealed by our own statutes," (*Peery v. Fletcher,* 93 Or. 43, 52, 182 Pac. 143 (1919)), and "so far as those rules were found to be applicable to existing conditions and suitable to the needs and necessities of the people," (*United States F. & G. Co. v. Bramwell,* 108 Or. 261, 265, 217 Pac. 332 (1923)).

In view of these authoritative rulings by the Supreme Court of the state, the provisional government and territorial legislation above mentioned did not at once impose on the people of Oregon the common-law doctrine of riparian rights, nor establish any rule of property that could not be changed by the legislature. We must look to the legislative and judicial history after statehood to find whether the common-law rule of riparian rights, without change, was found to be applicable to conditions and suitable to the needs and necessities of the people.

History Prior to April 20, 1885.

It will serve the convenience of the court to divide this point of our discussion into two phases, (1) that prior to April 20, 1885, because on that date patent was issued by the United States conveying to Francis Marion Friedenburg the lands now owned by petitioner, and (2) the period between April 20, 1885, and March 11, 1921, because on the latter date petitioner became owner of said lands (*R. 67*). Petitioner claims that the State of Oregon had become so committed to

the common-law policy of riparian rights as to constitute a rule of property upon which petitioner could rely. Petitioner did not favor the court with the derangment of title from the patentee, Friedenburg (*R. 64*). The only dates indicating the acquisition of title are those above mentioned. The policy of the state, if any definite policy had been established, must be ascertained as of those dates in determining whether there was a rule of property upon which a purchaser was justified in relying.

Act of 1864.

The first legislative action of the young State of Oregon with respect to waters was contrary to the common-law doctrine of riparian rights. The legislature in 1864 enacted a law with respect of mining which empowered miners to make local laws in relation to the possession of water rights, *subject to the laws of the United States. (Appendix 3, Act of 1864, Sec. 6.)*

Clearly this was contrary to the course of the common-law and is early denial that the common-law of riparian rights was to be the policy of Oregon.

In 1866 Congress enacted the law recognizing the nature of water rights that had grown up in Oregon and other Western States thus confirming those rights where they originated on public lands.

In 1877 Congress enacted the so-called Desert Land Act *(Appendix to petitioner's brief, p. 103)*, to which we shall refer later. Oregon construed this act to deny riparian rights to lands patented after March 3, 1877. (*Hough v. Porter,* 51 Or. 318, 399, 95 Pac. 732, 98 Pac. 1083 (1908).)

So far as a state policy was evidenced by legislation, we believe the foregoing expresses that policy up to

April 20, 1885. The act of 1864 makes the later federal legislation a part of the state policy. Both federal acts are contrary to the common-law rule of riparian rights, as is the Oregon legislation of 1864. Guaged by legislation, Friedenburg, as patentee of the United States, had no basis for asserting a vested property right in the common-law doctrine of riparian rights, and there is no evidence that he even knew of it.

Respondent believes the decisions of the Supreme Court of Oregon during the period prior to April 20, 1885, furnish just as small comfort to petitioner. During that period there was considerable use of the common-law terms respecting riparian rights. We think, however, there was not a single authoritative decision —certainly not one that could be fairly claimed to have established a general rule of property for those whose property was not involved in the litigation decided. Frequently the court indulged in general discussion of principles quite unnecessary to the narrow issues presented by the case. For this reason it is important to ascertain the issues in each case to see just what was decided.

Taylor v. Welch, 6 Or. 198 (1876).

In this case both parties claimed to be riparian owners, the plaintiff claiming only the natural uses of the water (which has always been conceded to the riparian owner to this day) and asserting an unlawful upper diversion by defendant. The case failed because the court found the water used by plaintiff was percolating water and not a flowing stream. This finding narrowed the issues too much to make discussion of riparian rights authoritative.

Dodge v. Marden, 7 Or. 456 (1879).

Defendants' ditch, constructed prior to 1866, crossed land acquired from the United States after the ditch was constructed. Defendants' right to maintain the ditch was sustained, the court thus recognizing the power of non-riparian land to acquire a water right under the Congressional Act of 1866.

Hayden v. Long, 8 Or. 244 (1880).

This was an action to abate a nuisance alleged to consist in defendant's diverting water above plaintiff's power device, and sending the water down to plaintiffs' reservoir charged with earth. The case was reversed because the trial court submitted the issues to the jury on the theory that both parties were riparian owners, whereas defendant was not riparian. It was a case of abuse of water.

Coffman v. Robbins, 8 Or. 278 (1880).

A quarrel between ranchers, both of whom were riparian to the stream, over water for irrigation. The existence of riparian rights was conceded, and not in issue. The water had been divided by agreement, which the court enforced.

Shaw v. Oswego Iron Works, 10 Or. 371 (1881).

A riparian owner sued to enjoin the diversion of water above his land. The sole issue was whether a non-meandered fresh water stream was navigable, and, if so, whether the bed of the stream belonged to the state or the riparian owner. There was no issue on the right of a riparian owner on a non-navigable stream to have the stream flow through his land undiminished. The court found the stream was not navigable, that the

riparian owners' title extended to the thread of the stream, and enjoined diversion. The right to the flow of the stream if not navigable was apparently conceded by defendant and not litigated. The court, in the course of its opinion, recognized that the common-law rights of riparian owners are much modified in the United States with respect to fresh-water navigable streams.

Shively, et al v. Hume, et al, 10 Or. 76 (1881).

The facts of this case, as stated in the opinion, do not make the relative positions of the parties clear, but both appear to be riparian owners. The plaintiff secured household water by sinking a barrel near the stream; the defendant constructed a tank above plaintiff's barrel in which he caught most of the water of the stream and diverted it to a mill. The only question was whether plaintiff's land was riparian. The parties conceded the case should be ruled by the common-law of riparian rights, so there was no issue on that.

The foregoing are all of the decisions of the Supreme Court of Oregon rendered prior to April 20, 1885, of which we have knowledge, that approach the question of riparian rights, even remotely. In none of them was the existence in Oregon of the common-law doctrine of riparian rights an issue. In three of them (*Taylor v. Welch, supra; Coffman v. Robbins, supra;* and *Shively v. Hume, supra*) both parties were riparian owners, claimed as such, and presented only the question of the relative rights of such owners. In one of them (*Shaw v. Oswego Iron Works, supra*) riparian rights were conceded if the stream was not navigable. One of them was to abate a nuisance (*Hayden v. Long, supra*) and one recognized a departure from the common-law riparian rule (*Dodge v. Marden, supra*).

Without an issue presented to the court as to the policy of Oregon with respect to riparian rights, we submit the court can not be held to have established a rule of property to bind the future. The facts would justify the conclusion that by April 20, 1885, the legislature had indicated a modification of the common-law doctrine of riparian rights, and the courts had applied the common-law where both parties conceded it.

History from April 20, 1885, to March 11, 1921.

We shall not burden the court with an attempt to analyze each water case decided during this period. They indicate a progressive departure from the common-law doctrine of riparian rights, a progressive formulation of a water policy for the State of Oregon that finally crystallized in legislation definitely making beneficial use the measure of right.

It should be stated, that in all discussion of riparian rights in the State of Oregon what is called the "natural rights" or "natural needs" of the riparian owner is always conceded and is recognized today, to-wit, the right to have water for household domestic use, stock water and garden irrigation (*Cavincss v. LaGrande Irrigation Company*, 60 Or. 410, 420, 119 Pac. 731 (1911); *In re Hood River*, 114 Or. 112, 190, 227 Pac. 1065 (1924)).

These natural rights were recognized and carefully preserved to petitioner in the decree of the trial court in the case at bar by providing that the water should always be maintained at an elevation that would permit water at all times to wash the banks of the stream on petitioner's lands (*R. 74, 79*).

We think a fair statement of the judicial history of the State of Oregon with respect to water rights from 1885 to 1921 would be that the court recognized ri-

parian rights where no issue was made on that point and between rival riparian owners administered the law according to the common-law doctrine of riparian rights, that it declared a modified doctrine of riparian rights, that it administered the law according to the rule of prior appropriation, and was without definite policy that could establish any rule of property until the rule of beneficial use was announced by the legislature.

The following cases are illustrative of those in which both plaintiff and defendant claimed as a riparian owner. There was no issue as to the existence of the doctrine of riparian rights and the court adjudicated their claims accordingly.

Weiss v. Oregon Iron & Steel Company, 13 Or. 496, 11 Pac. 255 (1886).
Cox v. Bernard, 39 Or. 53, 64 Pac. 860 (1901).

In each of the above mentioned cases the court discussed the common-law doctrine of riparian rights. The case of *Weiss v. Oregon Iron & Steel Company, supra*, is the case most cited in this state with respect to riparian rights and the case upon which petitioner here seems to most rely. It is the earliest case in Oregon undertaking to discuss and fully apply the common-law doctrine of the right of a riparian owner to lay the dead hand of idleness on the entire course of the stream above him, and it is the only case of which we have knowledge in which the Supreme Court of Oregon undertook to apply the doctrine of the right of a riparian owner to insist that the water flow by his premises without use. Yet that case is not a case of authority on the point involved here. While the court announced all of the principles of the common law as to riparians, the facts were that both parties were

riparian owners and each conceded that their rights should be determined by the law applicable to riparian ownership. The only real question was the manner and extent of the use of water by a riparian owner as against another riparian owner, and in this respect the court held that the use of water for manufacturing is not a natural use and refused to ease the common-law rule. There was no challenge of the riparian common law. We submit that without an issue made between a claim by appropriation and one through riparian ownership, in short where both parties concede the law under which their rights are to be determined, such a decision could hardly be beld to constitute a rule of property. The decision was rendered June 9, 1886, *more than one year after patent issued to petitioner's land.* That decision could not have established a rule of property for the purchase of land one year prior to its rendition and we say the petitioner did not accept its deed in 1921 in reliance upon the decision in *Weiss v. Oregon Iron & Steel Works* because prior to 1921 the State of Oregon had, through legislation, definitely established a contrary policy.

There is another class of cases in which the court definitely stated that the doctrine of riparian rights as it existed at the common law does not exist in the State of Oregon but is administered in a modified form. (*Carson v. Gentner,* 33 Or. 513, 52 Pac. 506 1898); *Brown v. Baker,* 39 Or. 66, 70, 65 Pac. 799, 66 Pac. 193 (1901); *Williams v. Altnow,* 51 Or. 275, 300, 95 Pac. 200, 97 Pac. 539 (1908).)

In the case of *Carson v. Gentner, supra,* the court made a fairly full statement with respect to this modified common law rule.

"The doctrine of the common law, that the water of a stream must continue to flow in its natural channel undiminished in quantity and unimpaired in quality, has been very much modified in the territory embraced in the Pacific Coast States, where a new rule, founded upon the necessities under which the early settlers labored, has been inaugurated. So much, only, of the common law was adopted by these settlers as was applicable to the condition of the country in which their lot was cast; and, realizing that water is a powerful agent in separating the precious metals from the baser materials in which they are imbedded, and also serves, when used in irrigating arid tracts, to cause the desert to bud, blossom and bear fruit, and that without the use of such water a vast region must forever remain valueless and uninhabited, necessity compelled these primitive lawgivers to adopt for their government a code of customs which prescribed the extent of public land each was entitled to, and regulated the manner of appropriating water to the operation of mines and the cultivation of farms, orchards, and vineyards. This latter custom provided that he who first changed the course of a natural stream flowing through public lands, which at the time was common to all, and appropriated the water so diverted to some useful purpose, thereby acquired a superior right to continue to use thereof against every claimant except the United States. The justice of this custom was recognized by the courts, which enforced its provisions in opposition to the doctrine of the common law; and the legislative assemblies of these states, following the example set by the courts, have passed in many instances acts guaranteeing protection to prior appropriators in their possessory rights in the diver-

sion of water against all claimants except the sovereign. The legislative action of this state on the subject is embodied in section 3832, Hill's Ann. Laws, approved October 24, 1864, which reads as follows: 'Miners shall be allowed to make local laws in relation to the possession of water rights, the possession and working of placer claims, and the survey and sale of town lots in mining camps, subject to the laws of the United States.'"

However, six years later, in the case of *Brown v. Baker, supra,* the court (39 Or., p. 70) declared the ancient common-law doctrine that would permit the first settler on a stream to have the entire flow even though it prevented the use of water by others, then on the same page stated that the right of appropriation and the doctrine of riparian ownership are entirely incompatible, and finally wound up (p. 75) by awarding to the plaintiff a *definite amount of water* (195 inches) which, under repeated decisions of this court, classed the plaintiff's claim as a claim by appropriation because no riparian owner has a right to a definite amount of the water of the stream. This is true of very many cases decided during this period by the Supreme Court of Oregon. The law of riparian rights was discussed learnedly and the cases decided on the doctrine of appropriation. Such was the case of *Bowman v. Bowman,* 35 Or. 279, 280, 57 Pac. 546 (1899). There both parties were riparian to the stream and claimed water for irrigation, but they claimed a diversion and appropriation to beneficial use of a definite amount of water and their rights were adjudicated as appropriators along with some discussion of riparian rights.

The same is true of the following cases in which there will be found discussion of the law of riparian

rights and what a riparian owner may insist upon to the exclusion of other water users, and yet the decision of the court was not by the rule of riparian rights but upon the doctrine of appropriation. (*Faull v. Cooke*, 19 Or. 455, 467, 26 Pac. 662 (1896); *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678 (1893); *Gardner v. Wright*, 49 Or. 609, 91 Pac. 286 (1907); *Caviness v. LaGrande Irrigation Co.*, 60 Or. 410, 119 Pac. 731 (1911).)

The cases last mentioned were not only decided upon the doctrine of appropriation, frequently with an unnecessary discussion of the common law of riparian rights, but they held that the two systems were so antagonistic that the claimant could not assert both a riparian right and a righ by appropriation on the same watercourse.

Then we have another class of cases in which the doctrine of appropriation alone is applied. Of this class are (*Ison v. Sturgill*, 57 Or. 109, 109 Pac. 579, 110 Pac. 535 (1910); *Cantrall v. Sterling Mining Co.*, 61 Or. 516, 122 Pac. 42 (1912)).

And again there are a series of cases in which the doctrine of appropriation was applied in upholding a prescriptive or adverse user claim against an alleged riparian right. Illustrative of these cases are (*Oregon Construction Co. v. Allen Ditch Co.*, 41 Or. 209, 215, 69 Pac. 455, 93 A.S.R. 701 (1902); *Britt v. Reed*, 42 Or. 76, 80, 70 Pac. 1029 (1902); *Davis v. Chamberlain*, 51 Or. 304, 309, 98 Pac. 154 (1908)).

In the case of *Britt v. Reed, supra*, in which the defendant settled upon a stream after the plaintiff had made an appropriation therefrom, the court seemed to question whether the riparian settler acquired any

rights to other than the natural uses by such settlement. There appears at page 80 the significant statement:

> *"Whatever rights* the defendant acquired as riparian proprietor by reason of his settlement on the stream were subordinate and subject to the prior rights of the plaintiffs and appropriators and must be exercised in subordination thereto."

This is significant because the opinion was written by Mr. Justice R. S. Bean who later, in 1908, wrote the opinion in the case of *Williams v. Altnow*, 51 Or. 275, 298, 95 Pac. 200, 97 Pac. 539 (1908) in which, for the first time, a serious question was presented as to whether any riparian rights other than the natural rights would go with a settlement upon riparian land after the enactment of the Desert Land Act by Congress. From an early day the court has limited all water rights to the amount actually needed for the purpose to which the water is to be applied.

In the case of *In re Rogue River Adjudication*, 120 Or. 237, 240, 251 Pac. 989 (1927), which was an appeal from the final adjudication of the relative rights to the stream upon which petitioner in this case is now claiming a riparian right that was not submitted to the adjudication, the court used this significant language:

> "It has always been the policy of the law, and still is, to permit any person to make any beneficial use of any water flowing in any non-navigable public stream."

The court has even gone so far as to deny an absolute right to the use of water claimed under a prior decree, limiting the amount to that which was actually

needed by the one to whom it was decreed. (*Claypoole v. O'Neill*, 65 Or. 511, 513, 133 Pac. 349 (1913).

We think it fair to say that until the enactment of the Water Code (1909) the policy of the State of Oregon with reference to water rights was developing. Perhaps it would not be disrespectful to our court to say it was in a state of flux. At any rate it was certainly too uncertain for anyone to pick out one single decision and declare it a rule of property unless it adjudicated the rights to the very property involved.

Oregon Water Code of 1909.

In 1909 the legislature enacted a water code defining water rights, the method of acquiring them and of having them adjudicated (*Appendix to petitioner's brief, p. 1*). This was a crystallization of the groping for a definite water policy evidenced by the decisions we have referred to above. The constitutionality of the method for adjudicating water rights provided by this legislation was upheld by this court (*Pacific Livestock Company v. Lewis*, 241 U.S. 440, 60 L. ed. 1084 (1916). Thereafter the Supreme Court of Oregon, prior to 1921, upheld the provisions of this water code, limiting riparian rights to the amount of water put to a beneficial use or in process of being put to a beneficial use at the date of the enactment of the water code. (*In re Willow Creek*, 74 Or. 592, 628, 144 Pac. 505 (1915) and thereafter ruled that in the case of *In re Willow Creek, supra*, it was decided that riparian rights were limited to the amount of water put to a beneficial use. (*In re Hood River*, 114 Or. 112, 176, 227 Pac. 1065 (1924).

We are not now discussing the constituionality of Section 70 of the Water Code (*Appendix to petitioner's brief, p.* 29) defining a vested riparian right. We are discussing the claim of petitioner that it purchased its

riparian lands in 1921 relying on a vested common law riparian right as a rule of property in Oregon. The only decision we know of in the State of Oregon sustaining the rule of idle water is *Weiss v. Oregon Iron & Steel Company, supra*, decided June 9, 1886. Since that time and prior to 1921 the Supreme Court of Oregon frequently announced the rule of beneficial use and in 1909 the legislature of the state definitely denied the constant flow theory. In 1915 the Supreme Court of Oregon passed its opinion *In re Willow Creek, supra*, in which it definitely limited the riparian right of an irrigator to the amount actually beneficially used before the enactment of the Water Code. Petitioner, in purchasing its lands, could not have relied on the early case of *Weiss v. Oregon Iron & Steel Company, supra.*

There is yet another class of cases which are asserted by petitioner to sustain its claim that the State of Oregon is committed to the common-law doctrine of riparian rights. We think the cases do not sustain the point they are cited to. They are nuisance cases exemplifying an abuse of the use of water to the damage of others. Illustrative of them are (*Carson v. Hayes*, 39 Or. 97, 99, 65 Pac. 814 (1901); *Trullinger v. Howe*, 53 Or. 219, 222, 97 Pac. 548, 99 Pac. 880 (1908); *Logan v. Spaulding Logging Company*, 100 Or. 731, 190 Pac. 349 (1920); *Harris v. Southeast Portland Lumber Co.*, 123 Or. 549, 557, 262 Pac. 243, 245 (1927)).

In the case of *Carson v. Hayes, supra*, a placer miner was impounding water and then turning it loose for the purpose of sweeping down stream the tailings from his operation. He thereby deposited them on the lands of plaintiff. This abuse was enjoined. In the cases of *Trullinger v. Howe, supra*, and *Logan v. Spaulding Logging Company, supra*, the defendants were impounding water in a floatable stream with

"splash" dams, filling the pond with logs and then opening the dam and shooting the immense volume of water charged with logs down stream. It resulted in flooding the power plant of Trullinger and the grist mill of Logan. This action again was enjoined.

In *Harris v. Southeast Portland Lumber Company, supra,* the plaintiff, owner of a summer home through which Johnson Creek flowed, complained because a mill owner whose mill was situated adjoining and downstream from plaintiff's summer home constructed a dam in the channel of the stream and backed the water up on the summer home so that the same became stagnant, filled with refuse and offensive. This abuse of water was enjoined.

To enjoin depositing mining tailings on one's land or the artificial flooding of one's grist mill or power plant or backing up water on one's land is hardly a recognition of the common law right to monopolize a stream contended for by petitioner. It is worth noting that both Trullinger's power plant and Logan's grist mill were in operation when the water code was enacted in 1909 and therefore had a vested right protected by that code.

Also it is contended that the case of *Norwood v. Eastern Oregon Land Company,* 112 Or. 106, 227 Pac. 1111 (1924) commits the State of Oregon to the doctrine of riparian rights even though that decision was rendered after the legislation of 1909 above referred to and in the same year in which the decision of the court was handed down in the case of *In re Hood River, supra.* We think there is no fair basis for this contention. The Norwood case must be read in light of the fact that it was litigation to enforce a prior decree of the court. The waters of Willow Creek were adjudicated and a final decree of the Supreme Court rendered in 1915 (*In re Willow Creek,* 74 Or. 592, 144 Pac.

505). In that case the Eastern Oregon Land Company had claimed as a riparian owner for the irrigation of approximately 7,000 acres of land, of which only approximately 292 acres had actually been irrigated. The court rejected the riparian claim as to all water that had not been put to a beneficial use and limited the water right of the Eastern Oregon Land Company under this claim to 292 acres (74 Or. 621, 628). After that decree was entered so limiting the right of the Eastern Oregon Land Company, it undertook to change the place of use of the water granted for its 292 acres and was sued by Norwood because Norwood was damaged by that change. The court in the case of *Norwood v. Eastern Oregon Land Company, supra,* was not determining any other question and certainly not any question of riparian rights other than that *as to irrigation* a riparian right is inseparable from the land.

A discussion of the judicial decisions in Oregon prior to 1921 would not be complete without a reference to the decision of Judge Bean in the case of *Eastern Oregon Land Company v. Willow River Co.*, 187 Fed. 466, 468 (1910). It is the habit of proponents of the riparian doctrine to quote only a portion of Judge Bean's statement on the subject of riparian rights. The full quotation is as follows:

"The *general* doctrine of riparian rights is too firmly established in this state to be shaken now by *judicial* decision. It is useless to cite authorities. The riparian proprietor is entitled to the ordinary and usual flow of the stream *as long as it is of any beneficial use* to him and this may, under some circumstances, include flood or overflow waters reasonably to be anticipated during ordinary seasons. * * * The modern tendency is to make the benefi-

cial use of water the test of the right, and, *unless it is put to a beneficial use* by a riparian proprietor or is of some substantial benefit to him, he ought not to be allowed to prevent its use by others." (Italics ours.)

It is to be noted that in that portion of the quotation relied upon by riparians the judge was referring only to the *general* common-law doctrine and concludes that is should not be overthrown by *judicial* decision. This is far short of a statement that the people through their legislature could not change the doctrine. Furthermore, he confines the riparian proprietor's right to the flow of a stream to the amount put to a *beneficial use,* and in that case denied an injunction because he concluded that the benefit of the flow of the stream would not be very great to the riparian owner.

Thereafter the Circuit Court of Appeals for the Ninth Circuit had the same question up in *Pacific Livestock Company v. Silver River Irrigation Co.,* 200 Fed. 487, 491 (1912) and definitely ruled that riparian rights have only a limited application in the State of Oregon.

Legislation since April 20, 1885.

Two legislative acts subsequent to April 20, 1885, are relied on by petitioner,—the Act of 1891 extending the right of eminent domain to those appropriating water for sale for irrigation and domestic use (*Appendix p.* 4), and the Act of 1899 extending the right of eminent domain to those appropriating water for public power purposes (*Appendix, p.* 19). The Act of 1891, in Section 8, and the Act of 1899, in Section 9, contain identic language. We quote from the Act of 1891:

"Such corporation may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location."

Petitioner seems to think that this language constitutes a recognition of the *very* right for which he is contending. We submit that recognition of a riparian right to have the stream flow *undiminished* and *unused* cannot be spelled out of this sentence. The language is vague. If meaning is given to every word in the sentence it would most fairly be construed to mean that the irrigator would have the right to condemn a water right gained by the riparian owner *actually applying the water to a beneficial purpose* through a diversion. The condemnor who proposes to divert water water below "the point of diversion" vested in the riparian owner by virtue of riparian ownership is given the right to condemn the flow of the water to the point of diversion so vested in the riparian owner. It seems to distinguish a point of diversion on public land from one on private land.

In addition to the legislation of 1891 and 1899 above mentioned, the legislature in 1893 passed an act (*Appendix 17*), which constitutes the first grant of a right to riparian owners. That grant is the right to use devices to raise water flowing through deep banks for the purpose of irrigation. If the common law of riparian rights existed in Oregon this Act of 1893 would be superfluous. The grant of these specified rights to a riparian owner indicates a legislative recognition that the common-law doctrine did not prevail in the State of Oregon. In 1905 the first attempt was made to provide for adjudication of water rights, the act

of that year providing (*Sec. 5, Appendix, p. 33*) for the adjudication of all rights on a stream from which there was to be an appropriation of water for general reclamation under guidance of the United States. A complete water code, which is under attack in this litigation, was passed in 1909 (*Appendix to petitioner's brief, p. 1*). In the same year the legislature declared all water in the State to be public property (*Appendix, p. 38*). In 1911 the legislature passed an act requiring certain fees to be paid by those claiming a water right for the development of power (*Appendix, p. 40*). This act recognizes a water right in those who developed the power prior to the enactment of the Water Code. Incidentally, we may mention in passing that nothing in this case indicates that petitioner or its predecessors in interest have ever paid any fees under this act. In 1913 the legislature enacted a law specifically providing that beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in the State of Oregon except those claimed for municipal purposes (*Appendix, p. 43*).

There is no rule of property to protect petitioner's claimed riparian right.

The doubtful claim of a rule of property based upon a court decision may only be asserted where that decision is rendered prior to the acquirement of the land involved and where the one acquiring the land may rely upon the decision as a rule of property.

2 Lewis' Sutherland Statutory Construction, 2d ed., Sec. 485, p. 906.

Sauer v. City of New York, 206 U.S. 536, 51 L. ed. 1176, 1187 (1907).

O'Neil v. Northern Colorado Irrigation Co., 242 U.S. 20, 61 L. ed. 123, 129 (1916).

Haskett v. Maxey, 34 Ind. 182, 33 N.E. 358, 19 L.R.A. 379 (1893).

Burgess v. Seligman, 107 U.S. 20, 27 L. ed. 359 (1882).

If the decisions of the court have been sufficiently clear-cut to justify a claim of a rule of property and thereafter, and before one claiming a rule of property has purchased, the policy of the state is changed by different decisions from the highest court, the later decisions will defeat the claimed rule of property.

Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 361, 77 L. ed. 360, 365 (1932).

Tidal Oil Co. v. Flanagan, 263 U.S. 444, 450, 68 L. ed. 382, 385 (1924).

Fleming v. Fleming, 264 U.S. 29, 31, 68 L. ed. 547 (1924).

Fidelity Columbia Trust Co. v. City of Louisville, 245 U.S. 54, 62 L. ed. 145, 149, L.R.A. 1918C, 124 (1917).

Mason v. A. E. Nelson Co., 148 N.C. 492, 62 S.E. 625, 18 L.R.A. (N.S.) 1221 (1908).

Whatever may have been the decisions of the Supreme Court of Oregon when the legislature in 1909 passed a law eliminating unused riparian claims, it destroyed any contention of a rule of property based upon decisions prior to the legislation or upon any decision contrary to the legislation.

Abilene Natl. Bank v. Dolley, 228 U.S. 1, 5, 57 L. ed. 707, 709 (1913).

Bean v. Morris, 221 U.S. 485, 55 L. ed. 821 (1911).

United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 706, 43 L. ed. 1136, 1142 (1899).

United States v. United Shoe Machinery Co., 264 Fed. 138, 150-151, 258 U.S. 451, 66 L. ed. 708, 259 U.S. 575, 66 L. ed. 1071 (1920).

Prior to April 20, 1885, when the United States issued patent to the land now claimed by petitioners, there had been no decision of the Supreme Court of Oregon determining as a *litigated point* that the common-law doctrine of riparian rights was the law of Oregon. True, there were a number of decisions in which the court discussed the common-law doctrine of riparian rights when that doctrine was not an issue in the litigation. Decisions, however, are authority only for those matters *litigated* and *decided*. Particularly they are not to be given the dignity of establishing a rule of property as to matters of general discussion in the decision, and which were not presented to the court by challenge.

Cohens v. Virginia, 6 Wheat 265, 5 L. ed. 257, 290 (1821).

Harriman v. Northern Securities Co., 197 U.S. 244, 291, 49 L. ed. 739, 761 (1905).

St. Anthony's Water Power Co. v. Board of Water Commissioners, 168 U.S. 349, 361, 42 L. ed. 497, 502, 504 (1897).

Union Tank Company v. William A. Wright, 249 U.S. 275, 286, 63 L. ed. 602, 608 (1919).

Brewer-Elliott Oil & Gas Company v. United States, 260 U.S. 77, 83, 67 L. ed. 140, 144 (1922).

7 R.C.L. 1003.

2 Lewis' Sutherland Statutory Construction, 2d ed., Sec. 486, p. 907.

Narrowing the cases to the actual point in controversy and decided, there will not be found in Oregon one single case sustaining the right of a riparian owner to the continuous flow of the stream undiminished in quantity and unimpaired in quality without putting the same to a beneficial use as against an

appropriator. As we stated earlier in this brief, the court has with learning discussed riparian rights and decided the case on the doctrine of appropriation, and where the question of the existence of riparian rights is conceded by the litigants has decided their rights on that doctrine. Prior to the acquisition of petitioner's property in 1921 both the Supreme Court of Oregon and the legislature of Oregon had definitely ruled out any earlier expressions with respect to recognizing the existence of riparian rights to the flow of the stream in this State.

The legislation of Oregon will not justify a claim that petitioner had a right to rely thereon for its claim of riparian rights. Much force is claimed by petitioner for the enactment of the early settlers constituting the provisional government of the Oregon Territory that justice should be rendered according to the course of the common law and that this was carried into the Constitution of Oregon. We think too much is claimed for this. (*Funk v. United States*, 290 U.S. 371, 384, 78 L. ed. 369, 376 (1933)). This court, in this exhaustive and well reasoned opinion, reviewed the discussions of the courts of many of the states and pointed out that the adoption of the common law generally leaves to each state the matter of determining to what extent it shall be applied in particular matters.

The only legislation subsequent to Oregon statehood is legislation providing for rights that are contrary to the doctrine of the common law, until the final enactment of 1909 definitely limiting claimed riparian rights to the amount of water put to a beneficial use. We submit that any contention that a riparian right attached to its property upon which petitioner could rely in purchasing the same is without substance.

III.

THE DESERT LAND ACT

The congressional act of March 3, 1877 (*Appendix to petitioner's brief, p. 103*), popularly known as the Desert Land Act, has had consideration from but few courts with respect of its effect, if any, upon riparian water rights as an incident to the ownership of land patented after the enactment of the Desert Land Act. Insofar as the land involved in the instant case was patented April 20, 1885, a holding that riparian rights were not an incident of ownership of the land after patent would at once determine this case against the contention of petitioner.

So far as we have been able to ascertain, four state courts have discussed the point here involved, but it has not been definitely decided by this court, with which must rest final construction of the Desert Land Act: *Ex parte Tyler*, 149 U.S. 164, 192, 37 L. ed. 689, 697 (1893).

The Desert Land Act with respect of irrigation was under discussion by this court in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703, 706, 43 L. ed. 1136, 1141, 1142 (1899), where there was involved a suit by the United States to restrain the defendant from damming the Rio Grande River in the Territory of New Mexico, and involved largely the question of navigability of that river. After holding that each state may modify the common-law rule as to waters, subject to the superior control of Congress on navigable streams, the court calls attention to the fact that the Congress recognized the inapplicability of the common-law rule in many of the western states, and passed the Act of 1866, the Desert Land Act of 1877, and the Act of March 3, 1891 (26 Stat. at Large

1101), granting rights of way for ditches across public lands, and then makes this comment with respect of these acts:

> "Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits."

Four years later, in the case of *Gutierres v. Albuquerque Land & Irrigation Co.*, 188 U.S. 545, 555, 47 L. ed. 588, 593 (1903), this court again had occasion to consider the Desert Land Act in a case arising from the Territory of New Mexico, in which the appellee sued to enjoin the appellant from interfering with preliminary work looking to the construction of canals for the diversion of the waters of the Rio Grande River. The court again reviewed the legislation of Congress above mentioned, with particular emphasis upon that portion of the Desert Land Act reserving for appropriation and use "all surplus water * * * of all, lakes, rivers and other sources of water supply upon the public lands and not navigable," and then said this with respect to the construction of the Desert Land Act:

> "We perceive no merit in the contention that the proviso in the Desert Land Act of March 3, 1877, declaring that surplus water on the public domain shall remain and be held free for the appropriation

and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights, is an expression of the will of Congress that all public waters within its control or the control of a legislative body of its creation, must be directly appropriated by the owners of land upon which a beneficial use of water is to be made, and that in consequence a territorial legislature cannot lawfully empower a corporation, such as the appellee, to become an intermediary for furnishing water to irrigate the lands of third parties."

Five years after the decision last referred to, this court decided *Boquillas v. Curtis,* 213 U.S. 339, 344, 53 L. ed. 822, 825 (1908); which involved a decision of the Supreme Court of the State of Arizona that riparian rights had legally been terminated in that state by legislation. This court declined to determine whether lands in the Desert Land states patented after March 3, 1877, did not carry riparian water rights, but referred to the decision of the Supreme Court of Oregon on that subject (*Hough v. Porter*) and stated it was based "on plausible grounds," and referred to the two decisions of this court above cited, as pointing to the conclusion reached by the Oregon court.

Fourteen years later, this court decided *Wyoming v. Colorado,* 259 U.S. 419, 465, 66 L. ed. 999, 1012 (1922), and construed the Desert Land Act of March 3, 1877, to be a part of the Congressional legislation in contravention of riparian rights.

While this court has not directly passed upon the question, we believe the foregoing decisions commit this court at least to the proposition that patents issued by the government conveying lands within the

Desert Land states after March 3, 1877, convey that land subject to some modification of the ancient common-law doctrine of riparian rights.

The State of Oregon early construed the Desert Land Act to eliminate riparian rights with respect of lands in this state patented after March 3, 1877, and since January, 1909, the Oregon court has consistently so ruled. The matter first came under the notice of the Supreme Court of Oregon in *Williams v. Altnow,* 51 Or. 275, 296, 298, 95 Pac. 200, 97 Pac. 539 (1908). In that case Altnow claimed both as a riparian owner, and as a prior appropriator. At page 296 of the Oregon Report the court said:

> "By the Desert Land Act, a claimant's right to water for irrigation and reclamation must depend upon a bona fide prior appropriation (Section 1, Act March 3, 1877, c. 107, 19 Stat. 377 (U.S. Comp. St. 1901, p. 1548) 6 Fed. St. Ann. p. 393), but there is nothing in the act which requires that the appropriation should be from one stream or source of supply, or which denies a settler the right to use on such claim water to which he has a bona fide right by prior appropriation from any source."

And then at page 298 added this:

> "And, again, it is a serious question whether the Desert Land Act does not abolish the so-called modified doctrine of riparian rights, which gives to riparian proprietors the right to use water for irrigation as to all lands through which non-navigable streams flow, the title to which has been acquired from the government of the United States since the passage of that act. It declares that all surplus waters over and above that appropriated by the desert land

claimant, 'together with the waters of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.' The government of the United States, as the primary owner of the soil, undoubtedly has the right to make such provisions concerning the waters of non-navigable streams thereon as it deemed proper, and it is at least a debatable question whether, by the language quoted, Congress did not intend to recognize and assent to the appropriation of such waters in contravention to the common-law doctrine of riparian rights as to persons subsequently acquiring title from the United States: *United States v. Rio Grande Irr. Co.,* 174 U.S. 690 (19 Sup. Ct. 700; 43 L. ed. 1136). But it is not necessary to decide either of the questions suggested at this time."

Three months later the Supreme Court of Oregon decided *Hough v. Porter*, 51 Or. 318, 382, 399, 95 Pac. 732, 98 Pac. 1083 (1909). Beginning at page 382 of the Oregon Report is the court's discussion of the effect of the Desert Land Act, and at page 399 the Supreme Court of Oregon announced its definite conclusion "that all lands settled upon after the date of the latter act (Desert Land Act) were accepted with the implied understanding that * * * the first to appropriate and use the water for the purposes specified in the act should have the superior right thereto."

This court announced the decision of the Supreme Court to be upon plausible grounds in *Boquillas v. Curtis, supra,* and we submit that the reasoning of the Supreme Court of Oregon in this case is clear and justifies the conclusion reached. The rule announced in

that decision has been applied ever since by the Supreme Court of this state. (*Hill v. American Land & Livestock Co.*, 82 Or. 202, 207, 161 Pac. 403 (1916) and the decision of the Supreme Court of Oregon in *Hough v. Porter, supra,* has been approved and followed by the Supreme Court of South Dakota (*Cook v. Evans,* 45 S. Dak. 31, 185 N.W. 262, 264 (1921); *Haaser v. Englebrecht,* 45 S. Dak. 143, 186 N.W. 572 (1922).

The Supreme Court of California, however, declined to follow *Hough v. Porter, supra,* and in *San Joaquin & King's River Canal & Irrigation Co. v. Worswick,* 187 Cal. 674, 203 Pac. 999 (1922), construed the Desert Land Act as applicable only to Desert Lands, that is to say, that the broad language reserving all waters on non-navigable lakes and streams for appropriation meant only for appropriation for use on lands acquired under the Desert Land Act. We suggest that this construction of the Desert Land Act is too narrow and not in harmony with the decisions of this court above cited.

The Ninth Circuit Court of Appeals in the majority opinion in the instant case cited, as opposed to the Oregon court's construction of the Desert Land Act, the following decisions of the Supreme Court of the State of Washington: *Still v. Palouse Irrigation & Power Co.,* 64 Wash. 606, 117 Pac. 466 (1911), and *Bernot v. Morrison,* 81 Wash. 538, 559, 143 Pac. 104, 111, Ann. Cas. 1916D 290 (1914). While the Washington court did deny the claim that the Desert Land Act protected the defendants in those cases in the rights claimed, we submit that neither of the cases involved any question justifying a construction of the Desert Land Act; that each of them involved and should have been decided upon the sole ground of no right to

commit a nuisance with water. In each of the cases complaint was made because lower appropriators undertook to dam the outlet of lakes and back the water upon the land of adjoining riparian owners so as to flood those lands and destroy the crops growing thereon. Clearly the Desert Land Act did not pretend to authorize any such invasion of the property rights of another, and just as clearly the cases were and should have been decided upon the sole ground of abuse of water, without reference to the Desert Land Act.

We think a fair statement is that up to this time the Supreme Courts of the states of Oregon and South Dakota have construed the Desert Land Act to eliminate riparian rights as to lands in those states patented after March 3, 1877; that the Supreme Court of California has construed the act to apply only to lands acquired under the Desert Land Act; and that this court has ruled that the Desert Land Act does contain a modification of the riparian doctrine, but has not yet decided the extent of that modification.

We believe the construction of that act by the Supreme Court of Oregon is correct. It is true that the act is dealing with the reclamation of desert lands, but it is also true that the body of a Congressional determines its scope. The Desert Land Act, after providing for the filing upon desert land by the citizen, contains a proviso requiring the right to the use of water for reclamation of the land to depend upon prior appropriation, and to be limited to the amount actually needed for the reclamation. The language of the proviso, "Provided, however, that the right to the use of water by the person conducting the same, on or to any tract of desert land of 640 acres, shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually ap-

propriated, and necessarily used for the purpose of irrigation and reclamation," definitely eliminates a riparian claim of water for lands acquired under the Desert Land Act. Nothing further would be needed to confine water rights to the doctrine of appropriation measured by necessity with respect of lands acquired under this act. Thus far the proviso clearly does away with riparian claims on the lands filed upon under the Desert Land Act, but the proviso continues with this significant language: "And all surplus water over and above such actual appropriation and use, together with the waters of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights." This language, we submit, does very much more than to eliminate riparian rights from lands acquired under the Desert Land Act. The words down to the first comma reserve from a claim of riparian rights all water in excess of that required to reclaim the desert land filed upon, and, but for the words following the word "use" down to and including the word "navigable," there would be plausible support for the contention that the reservation of riparian rights applied only against the desert land claimant. The proviso thus modified would read: "That all surplus water over and above such actual appropriation and use shall remain and be held free for the appropriation and use," etc. But, we submit, the Congress did not so limit the legislation, but provided that not only water in excess of that needed for the reclamation of desert lands but also "the water of all lakes, rivers and other sources of water supply upon the *public lands* and not navigable," shall remain free for appropriation. This language is all-inclusive, not at all

necessary to reserve water on desert lands or to reserve water from the riparian claims of desert lands, and means something more than merely the reclamation of desert lands. That meaning, we submit, is made clear by the last words of the proviso, that the waters of all lakes, rivers and other sources of water supply upon the *public lands* and not navigable, shall remain and be held free for the appropriation and use "of the public for irrigation, mining and manufacturing purposes." The fact that this reservation is not confined to water for irrigation or for the reclamation of desert lands, but is made for all purposes for which water is useful, seems to us significant. The reservation is not limited to desert lands, it embraces all public lands. The reservation is amply broad to eliminate riparian rights in the Desert Land states as to patents issued after March 3, 1877.

The debates in Congress indicate that the interpretation of the Desert Land Act by the Supreme Court of Oregon, at least in the result reached by that court, is correct.

The Desert Land Act (H.R. 4261) was reported to the Senate by Senator Booth, chairman of the Public Lands Committee, and called up for consideration by Senator Sargent February 27, 1877 (*Congressional Record, p. 1965*). The Committee's report, among other things said:

> "It is believed that by far the larger portion of land bordering on the streams, where sufficient moisture exists for cultivation and where irrigation is cheap and easy, have been appropriated; but the provisions of this bill will enable settlers by combined efforts to construct more extensive works and reclaim a class of lands that are now absolutely

worthless. * * * A system has already grown up in the states and territories included in the bill, created by custom and legislation, and sanctioned by the courts, which recognizes priority of appropriation as the rule governing the right to the use of water and limits such appropriation to the water actually used, leaving the surplus free to other appropriators, and thus avoiding waste and preventing monopoly."

In the course of a running debate, Senator Sargent said (*Congressional Record, p. 1966*):

"For instance, we have found * * * the cattlemen go under a fictitious compliance with the terms of the preemption law and take their land along the margin of the streams, and then there is no possibility of getting water to the back country at all. I want to provide so that persons in the back country may go above such a person, for instance, on Humboldt River, and take the water out and conduct it into the back lands."

Senatory Oglesby, of the Public Lands Committee, submitted an amendment consisting of the proviso under discussion here, but omitting reference to manufacturing, in the course of which he made a statement of objections to permitting anyone taking land fronting on a stream and thereby obtaining control of the wafer (*Congressional Record, p. 1968*), and thereafter explained that the purpose of the bill was to make the water free for all uses (*p. 1969*). Finally, the House failing to agree with Senate amendments, there was a conference and in conference the word "manufacturing" was added to the uses for which water was reserved, and the proviso adopted as it now appears in the bill (*Congressional Record, p. 2156*).

Analyzing this record, we find that the committee understood that the act was making appropriation the sole method of acquiring water rights on the public land, and that Senator Sargent, who was in charge of the bill, expressly stated that the purpose of it was to prevent settlers under *other land laws* from acquiring riparian rights that would tie up the water. Congress proposed to end riparian claims as to lands patented after March 3, 1877.

The instant case illustrates why the act touches more than desert lands. Rogue River rises in an area of heavy precipitation, passes through a valley of light precipitation where semi-arid lands require irrigation, and then joins the Pacific Ocean in an area of coastal rains. From Northern California to the British Columbia border this is probably true of other streams. Certainly the Columbia River (navigable for a considerable distance above its mouth) flows through the arid section of Eastern Washington where it is non-navigable, and its waters are used for irrigation and power. It is true of Klamath River, flowing from Eastern Oregon into the Pacific Ocean in Northern California. Construction of the Desert Land Act to limit riparian rights on desert land only would be destructive of its purpose as to such streams as those mentioned. A riparian owner near the Pacific Ocean could prevent use of water in the upper arid section.

There is presented as to the lands of petitioner in the instant litigation the question whether the ruling of the Oregon Supreme Court in Hough v. Porter, supra, should not be controlling regardless of what this court may determine to be the proper construction of the congressional legislation.

Beyond doubt all courts must look to this court for an authoritative construction of the Desert Land Act. Furthermore, as to unpatented lands there can be no

question that rights claimed by force of the decisions of a state court must immediately yield to the decisions of this court. (*Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 182 U.S. 499, 505, 45 L. ed. 1200, 1205 (1901).) That decision, however, was dealing with *public* land upon which mining claims had been filed and as to which there were conflicting claims under acts of Congress. This court properly ruled that regardless of numerous contrary decisions by the Supreme Court of Colorado, uniformity of mining rights demanded that claimants to these mineral lands abide by the ruling of this court.

In the case at bar, however, we are not dealing with rival claims to unpatented lands. The lands of petitioner were patented by the United States April 20, 1885, and at once became subject to the laws of real property of the State of Oregon. In the gradual development of a policy to govern water rights in the State of Oregon, the Supreme Court of this state reached the conclusion and definitely decided that lands patented to citizens of this state after March 3, 1877, should not have a claim to water as a riparian. It was for the State of Oregon to determine what its water law should be and to what extent, if at all, it would recognize riparian rights. It concluded that it would not recognize riparian rights to lands patented after March 3, 1877, and has consistently and repeatedly so ruled. Even though its construction of the effect of congressional legislation should be erroneous, is its decision of landed rights or water rights in this state as to property that is no longer a part of the public domain, to be overturned because the reason for the decision may have been erroneous? It seems to us there is involved merely a question of power, that the Supreme Court of Oregon had the power to decide,

regardless of the wisdom or correctness of the reason for the decision.

We cannot follow the apprehension of petitioner that curtailment of riparian rights on lands patented after March 3, 1877, would work havoc to persons owning meadowlands in the eastern part of the United States, who have been enjoying the exercise of the use of their riparian rights on the streams upon which they border, and would find their lands arid and stripped of value (*Pet. Brief 184*). The Desert Land Act is confined to certain of the western states (*Appendix to Pet. Brief 105*) and where water has been applied to a beneficial use by a riparian owner it is just as fully an appropriation of the water as though his land were not riparian, and such use would not be affected by application of the Desert Land Act as we contend.

IV.

THE OREGON WATER CODE OF 1909 DID NOT DENY TO PETITIONER EQUAL PROTECTION OF THE LAW NOR TAKE ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

Section 70 of the Oregon Water Code (*Appendix to petitioner's brief, p. 29*) protects vested rights, but defines vested rights in a riparian owner to be the right to use the amount of water theretofore put to a beneficial use and necessary therefor, carefully protecting the rights that may have been initiated under any of the prior water laws. Petitioner contends that because this act did not give it additional time in which to initiate a right its constitutional rights are invaded.

In approaching this point we call the court's attention to subdivision 6 of Section 70 of the act, which protects any attempt to apply water to a beneficial use under any of the laws existing prior to the time the act was filed in the office of the Secretary of State.

This, we think, would protect any right to which there was any valid claim, providing development was undertaken promptly.

Equal protection of the laws not denied.

The Water Code classifies riparian owners into (1) those who have put water to a beneficial use, (2) those who have a claimed right under any prior existing law, and (3) those who are merely riparian to the stream, but have done nothing whatever toward use of the water. The mere fact that such a classification was made does not deny petitioner equal protection of the laws, nor does the fact that those who had made no move toward use of the water were placed in a different class than those who had initiated a right or actually applied the water to a beneficial use, unless this court can say there was no reasonable basis for the Legislature to make such classification: *Fred L. Fox v. Standard Oil Company of New Jersey*, — U.S. — (January 14, 1935); *Nebbia v. People of the State of New York*, 291 U.S. 502, 520, 78 L. ed. 940, 947 (1934); *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 448, 78 L. ed. 413, 434 (1934); *Charlie Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 63 L. ed. 527, 534 (1919).

We submit that the very great importance of water in the development of the western part of the United States, where on the same stream there will be uses for navigation, floating timber to mills, mining, power and irrigation, was a real basis for classifying claimants into those who had put the water to a beneficial use, those who had a claim based under prior law, and those who merely claimed the right to have the water flow idly by their land.

The act does not take petitioner's property without due process of law.

If what we have said in prior subdivisions of this brief is sound, there is no basis for the argument that plaintiff's property was taken without due process because the plaintiff did not have a vested riparian right of the character here claimed. Regardless of those contentions of respondent, we believe petitioner's contention in this respect is not sound. This discussion requires reference again to the Constitution of Oregon, Article XVIII, Section 7, "All laws in force in the Territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed." Petitioner contends that the section of the Organic Act of the provisional government providing that justice should be administered according to the course of the common-law meant that the common-law theory of riparian rights was legislated and that this was carried into statehood by the constitutional provision above provided. This claims a great deal for a general provision to conduct proceedings according to the common law, but, accepting without conceding it, we refer the court to the last words of the constitutional provision above quoted—continuing laws in force in the territory "until altered or repealed." We submit that this constitutes a *reservation* of power to change the common-law as to any except those who have taken advantage of the asserted existence of the common-law doctrine of riparian rights. We believe that if the common-law doctrine of riparian rights could reasonably be held to have been imposed upon the people of Oregon by the action of the provisional government relied upon by petitioner, the reservation in the constitutional provision above quoted would permit the state to withdraw that right at any time before claimant had put the water to a beneficial

use. Certainly if there had been a power development or any diversion of the water for a beneficial purpose by the riparian owner, we would have a different question. Until the privilege of using the water had been exercised, we think the claimant had nothing more than a privilege that was subject to withdrawal.

It was thus ruled by the Supreme Court of Arizona in the case of *Boquillas Cattle Co. v. Curtis,* 11 Ariz. 128, 89 Pac. 504, 507 (1907), which was affirmed by this court in 213 U.S. 339, 53 L. ed. 822 (1909). The same court in *Verde Water & Power Co. v. Salt River Valley Water Users Association,* 229 Ariz. 305, 197 Pac. 227 (1921), ruled that the privilege granted by congressional act to impound water in a reservoir site was a mere license subject to withdrawal even after large money had been expended, and this court refused to review the decision (257 U.S. 643, 66 L. ed. 412 (1921).

The rule has been frequently applied with reference to formal contracts with a state or municipality where there was a reserved right to amend or repeal: *Spring Valley Water Works v. Schottler,* 110 U.S. 347, 28 L. ed. 173, 176 (1883); *Tomlinson v. Jessup,* 15 Wall. 454, 21 L. ed. 204, 205 (1872); *Capital City Light & Fuel Co. v. Tallahassee,* 186 U.S. 401, 46 L. ed. 1219 (1901); *Frank C. Thornton v. Thomas J. Duffy, et al,* 254 U.S. 361, 369, 65 L. ed. 304, 309 (1920).

This court has likewise sustained the power of the legislature to withdraw rights granted by prior legislative acts, but not yet exercised: *Greenwood v. Union Freight R.R. Co.,* 105 U.S. 13, 26 L. ed. 961, 963 (1881); *Pearsall v. Great Northern Ry. Co.,* 161 U.S. 646, 40 L. ed. 838, 847 (1895); *Looker v. Maynard, ex rel Dusenbery,* 179 U.S. 46, 45 L. ed. 79 (1900).

Furthermore, the Water Code provides for a penalty for those using water in violation of the provisions of the Code (*Section 66-68; Appendix to petitioner's brief, pp. 28-29*).

This court has ruled that where, in the exercise of a power vested in Congress, it makes unlawful that which was lawful when the right thereto vested, the right can not thereafter be exercised: *Louisville & Nashville R.R. v. Mottley,* 219 U.S. 466, 468, 55 L. ed. 297, 302 (1910). This ruling was re-affirmed in the recent decisions involving the Gold Clause legislation.

The Legislature could withdraw riparian rights independent of express reserved power.

We believe the reserved police power of the state is just as broad as a grant of power to Congress. *Hadacheck v. Sebastian,* 239 U.S. 410, 60 L. ed. 356 (1915). This court has repeatedly ruled that there is no vested right in a rule of the common-law: *Funk v. United States,* 290 U.S. 371, 383, 78 L. ed. 369, 376 (1933); *Munn v. People of Illinois,* 94 U.S. 113, 24 L. ed. 77 (1876); *New York Central Ry. v. White,* 243 U.S. 188, 61 L. ed. 667 (1916). This rule has been specifically applied to a withdrawal of riparian rights and complete reversal of the state's position thereon, this court holding that each state has a right to determine what its law on that subject shall be: *Atchison v. Peterson,* 20 Wall. 507, 511, 22 L. ed. 414, 415 (1874); *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 703, 706, 43 L. ed. 1136, 1141, 1142 (1899); *Kansas v. Colorado,* 206 U.S. 46, 86, 51 L. ed. 956, 970 (1906); *Bean v. Morris,* 221 U.S. 485, 55 L. ed. 821 (1911); *Oklahoma v. Texas,* 258 U.S. 574, 596, 66 L. ed. 771, 780, 781 (1922); *State of Connecticut v. Commonwealth of Massachusetts,* 282 U.S. 661, 670, 75 L. ed. 602, 607 (1931); and the right has been as-

serted and exercised by the several western states in reliance upon these decisions of this court, and based upon either a change of the claimed former riparian right by legislative enactment or by constitutional amendment: *Geo. L. Peabody, et al, v. City of Vallejo*, 89 Cal. Dec. 165 (Jan. 31, 1935, not yet in Pacific Reporter). In that case the Supreme Court of California had under consideration for the second time a constitutional amendment putting an end to the ancient common-law doctrine of riparian rights (a doctrine to which the state had become committed in a very early decision). The court held that the State of California has compelte control over water of non-navigable streams and may restrict riparian rights by legislation after such rights are claimed to have attached. The decision was preceded by the case of *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 22 Pac. (2d) 5, 13, 15 (1933), in which the court found that the common-law of England had been adopted by statute, but held that the people had a right to thereafter modify the law even as to rights claimed under such statute.

Miller v. Letzerich, 121 Tex. 248, 49 S.W. (2d) 404, 412 (1932).

This case contains a very interesting discussion of both the civil law and the common-law which was adopted in Texas and upholds a change by statute of common-law rights which were then in process of being exercised.

Yeo v. Tweedy, 34 N.Mex. 611, 286 Pac. 970 (1930).

Here was involved the right to underground water. The court points out, at page 972 of the Pacific Reporter, that a sweeping general statute adopting the common-law is more a rule of practice and does not

carry into the state law each detailed right of property existing at common-law. The court there upheld an act very similar to the Oregon Water Code, completely codifying the water law of New Mexico, and limiting riparian rights to those put to a beneficial use before the enactment of the Code.

Reno Smelting Works v. Stevenson, 20 Nev. 269, 21 Pac. 317, 4 L.R.A. 60, 19 Am. St. Rep. 364 (1889).

This case is of more than usual interest because the plaintiff had actually applied water to a beneficial use, but presented his claim as a riparian owner only. The State of Nevada had adopted in general terms the common-law and the Supreme Court had handed down a decision sustaining the common-law of riparian rights. The Supreme Court of Nevada in an opinion showing great research held that the general adoption of the common-law did not commit the state to an irrevocable policy regarding water rights, that the Supreme Court or the Legislature had a right to reverse that policy, and that even as to the plaintiff, which had put water to a beneficial use, the court would send the case back for the plaintiff to assert his claim under the policy of appropriation that then prevailed in the state. This case and its reasoning is approved by this court in *Funk v. United States,* 290 U.S. 371, 383, 78 L. ed. 369, 376 (1933), where this court writes what might be termed a monograph on the limited meaning of a general adoption of common-law rules of procedure, and upon the right of the state to depart therefrom as conditions justify.

Petitioner has labored at great length in its brief arguing a construction of the Oregon Water Code of 1909 that would make it either (1) inapplicable to an undeveloped claimed riparian right, or (2) would ex-

pressly grant a continuation of such right without development. It is hardly necessary to answer this argument because the statute has been construed adversely to petitioner's contention by the Supreme Court of Oregon. This construction should and probably will be accepted by this court (*Ex parte Tyler*, 149 U.S. 164, 192, 37 L. ed. 689, 697 (1893); *Ennis Water Works v. City of Ennis*, 233 U.S. 652, 658, 58 L. ed. 1139, 1141 (1914)).

The Supreme Court of Oregon definitely decided in the case of *In re Willow Creek*, 74 Or. 592, 608, 621, 622, 144 Pac. 505, 146 Pac. 475 (1915), that the Oregon Water Code of 1909 did limit a claimed riparian right to the amount of water actually put to a beneficial use, and that construction of the statute was again applied in the case of *Re Water Rights of Hood River*, 114 Or. 112, 166, 175, 227 Pac. 1065 (1924).

The argument of petitioner that a different question was involved in the case of *Re Water Rights of Hood River*, because the lands of the Pacific Power & Light Company were acquired from the state, will not be borne out by the record in that case. The Pacific Power & Light Company endeavored to date its right back to statehood upon the contention that Sections 16 and 36 passed to the state at that time and carried with them whatever water rights theretofore existed in the federal government. The question was raised in the case as to whether riparian rights could attach to such land. The Supreme Court held it necessary to and did definitely pass upon the question of riparian rights. The court stated the question in this manner (114 Or., p. 166):

"The main question for determination as to the Pacific Power & Light Company upon this appeal is

as to its claim for water power as a riparian proprietor, that is, what is the nature and extent of the Power Company's right."

Thereafter followed a discussion of the development of the Water Law in Oregon and the definite holding that, although the Power Company asserted it had always claimed as a riparian owner, such rights were cut off (except as to water put to a beneficial use) by the Water Code of 1909.

It would be a work of supererogation for us to argue that in enacting the Water Code of 1909 the Legislature of Oregon was exercising its police power. That is the power upon which a state draws when it passes laws regulating the use of its property. We think this is elementary. Likewise it is clear that the Supreme Court of Oregon was aware that the Code was enacted in exercise of the police power, from the following statement of that court in the case of *In re Willow Creek*, 74 Or. 592, 610, 144 Pac. 505, 146 Pac. 475 (1915):

"It is evident that in the enactment of the Water Code the state, being interested in providing a system for the regulation of the use of the water and for the determination of existing rights, thereby exercised the police power of the state in order to provide a complete system of state control, in the regulation of the diversion and use of the water and a means for having a record made of the rights to the same, for much the same purpose as records of title to real property are provided."

V.

NO ACTUAL DAMAGE SHOWN TO JUSTIFY INJUNCTIVE RELIEF.

Petitioner asserts the right to injunctive relief upon two theories, (1) that it has a vested right to the use of the water, and (2) that it has a common ownership of the entire bed of Rogue River at that location.

(1) The first contention begs the question. If petitioner actually has a riparian right to the use of water for power which it did not need to submit to the adjudication of the relative rights to use the waters of Rogue River and which was not withdrawn by the Water Code of 1909, then the right to an injunction follows as a matter of course. The whole argument of petitioner and very much of the citation of authority in petitioner's brief is directed to the fact that vested rights will be protected. *The question is whether petitioner had any vested right.* In this connection we direct attention to the fact that the trial court found that the physical property of petitioner had not been damaged. The decree of the trial court carefully preserved the right of petitioner to have sufficient water flow over its side of the stream to meet its natural needs, which are the recognized riparian rights in this state.

The court made other findings that to us are significant. They are significant because these findings were not challenged in the assignments of error made by petitioner on appeal to the Circuit Court of Appeals. Finding VIII (*R. 71*) recites that the Condor Water & Power Company, a predecessor in interest of petitioner, in 1906 filed a suit to enjoin a predecessor in interest of respondent from building entirely across the stream a dam for power purposes, and in that suit the Condor Company claimed that it needed the water

for uses in development of power, but that neither this company nor any one of its successors in interest down to and including the petitioner had ever made a move to put the water to a beneficial use. This failure to demonstrate a need for the power site can not be met by the statement that petitioner has been in litigation. It was not in litigation from 1911 to 1926 (*R. 391*). The litigation to prevent this *respondent* from constructing its power development was not litigation that would prevent *petitioner* from constructing its power plant if needed, but was litigation instituted by petitioner to prevent respondent from developing its power rights. During all of that time there was nothing to prevent petitioner from developing its power right if it had any. So we say there is no damage, present or prospective, shown by petitioner that would justify an injunction to enjoin the use of the waters of the stream by others. The riparian owner has no property in the water, but merely a usufruct as it passes. (*Atchison v. Peterson*, 20 Wall. 507, 511, 22 L. ed. 414, 415 (1874)).

(2) We think the Act of May 18, 1796 (*1 Stat. 468*) so much cited and relied on by petitioner, will not sustain petitioner's contention that petitioner *owns clear across the bed of Rogue River*, and therefore respondent may not improve its property west of the thread of the stream.

Originally the Act of 1796 applied only to the Northwest Territory. Later by Act of March 3, 1803 (*2 Stat. 235*), a similar provision as to navigable waters was extended to the states south of Tennessee.

The Revised Statutes (2476) applied the rule generally to public lands. This policy of the federal government was never intended to deprive the several public land states of their right and power to deter-

mine the incidents of land ownership. Repeatedly this court has upheld the right of each state to determine such matters.

Barney v. Keokuk, 94 U.S. 324, 341, 24 L. ed. 224, 228 (1877).

Packer v. Bird, 137 U.S. 661, 672, 34 L. ed. 819, 821 (1891).

St. Anthony Falls Water Power Co. v. Board of Water Commissioners of the City of Saint Paul, 168 U.S. 349, 361-364, 42 L. ed. 497, 502, 503 (1897).

Hudson Water Company v. McCarter, 209 U.S. 349, 356, 52 L. ed. 828, 832 (1907).

Brewer-Elliott Oil & Gas Company v. United States, 260 U.S. 77, 88, 67 L. ed. 140, 146 (1922).

In Oregon the riparian owns to the thread of the stream only.

Shaw v. Oswego Iron Works, 10 Or. 371 (1881).

Micelli v. Andrus, 61 Or. 78, 85-86, 120 Pac. 737 (1912).

Wyckoff v. Mayfield, 130 Or. 687, 689, 280 Pac. 340 (1929).

While a *natural* sudden change in the channel of a stream leaves the old thread the boundary (*1 Wiel, Water Rights* (3d ed.), p. 915), it is unnecessary to discuss the effect on boundaries of an *artificial* change, because the decree in this case carefully requires the waters of Rogue River to be maintained by respondent at an elevation that will require a large volume to flow over petitioner's side of the river bed (*R.* 78) following findings of like nature (*R.* 74). The opinion of the trial court explains that the decree will maintain the thread of the stream (*R.* 65).

The suggestion in the dissenting opinion of Judge Wilbur that respondent be required to pay petitioner for the use of water which petitioner is not ready to use and has not used, is contrary to the entire doctrine of the Oregon water law, both before and after adoption of the Water Code of 1909. As stated by this court in *Atchison v. Peterson, supra,* the riparian owner has only a usufruct in the water. As stated by the Supreme Court of Oregon in an appeal from the adjudication of the waters of this very stream (*In re Rogue River Adjudication,* 120 Or. 237, 240, 251 Pac. 898 (1927)), it has always been the policy of the State of Oregon to permit anyone to use the waters of a stream when others do not need it. To hold that mere ownership of land riparian to a stream would permit the owner to compel payment of tribute from others who have a right to use the water under the policy of the Oregon law, would be contrary to the entire theory of water law as administered in this state.

The suggestion repeatedly made by petitioner that the effect of the Water Code as enforced by the decree of the lower court is to take the property of the petitioner and give it to respondent, is, we submit, unsound and based upon a misconception of the Water Code. That Code did not take the property of anyone and give it to another. It was designed to put an end to *idle* water and to require its development and use as prerequisite to a claim thereto. It gave no rights to anyone, except as those rights were developed by actual use. When it withdrew and refused to recognize riparian claims that had never been exercised, it did not confer the use of that water upon any other person or corporation. The water belonged to the public. That public took back what was its own and granted to all alike the right to acquire the privilege of using that

water by putting it to a beneficial use. That right was extended to petitioner just the same as to respondent, and had petitioner desired to develop power at this point it could have requested a permit to apply the water to that purpose, just as respondent did. This wholesome law, calculated to bring about development of the state's resources and provide an orderly determination of relative rights and a record thereof so this development can proceed, should be sustained.

CONCLUSION

We submit the decree should be affirmed.

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APPENDIX

APPENDIX

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APPENDIX

OREGON LAW OF 1864

"An act to establish and regulate quartz mining claims, and in relation to placer claims, town sites, and water-rights in mining camps and to avoid litigation.

"Section 1. That any person or company of persons, establishing a claim on any quartz lead containing gold, silver, copper, tin or lead, or a claim on a vein of cinnabar, for the purpose of mining the same, shall be allowed to have, hold and possess the land or vein with all its dips, spurs and angles, for the distance of three hundred feet in length, and seventy-five feet in width on each side of such lead or vein.

"Section 2. To establish a valid claim, the discoverer or person wishing to establish a claim, shall post a notice on the lead or vein, with name or names attached, which shall protect the claim or claims for thirty days; and before the expiration of said thirty days, he or they shall cause the claim or claims to be recorded as herinafter provided, and describing as near as may be the claim or claims, and their location; but continuous working of said claim or claims, shall obviate the necessity of such record. If any claim shall not be worked for twelve consecutive months, it shall be forfeited, and considered liable to location by any person or persons, unless the owner or owners be absent on account of sickness or in the service of their country in time of war.

"Section 3. Any person may hold one claim by location, as hereinafter provided, upon each lead or vein, and as many by purchase, as the local laws of the miners in the district where such claims are located, may allow; and the discoverer of any new lead or vein, not previously located upon, shall be allowed

one additional claim for the discovery thereof; nothing in this section, shall be so construed as to allow any person, not the discoverer, to locate more than one claim upon any one lead or vein.

"Section 4. Every person or company of persons, after establishing such claim or claims, shall, within one year after recording or taking such claim or claims, work or cause to be worked, to the amount of fifty dollars for each and every claim, and for each successive year shall do the same amount of work, under penalty of forfeiture of said claim or claims, Provided, That any incorporate company owning claims on any lead or vein, may be allowed to work upon any one claim, the whole amount required as above, for all the claims they may own on such lead or vein.

"Section 5. It shall be the duty of the county clerk of any county, upon the receipt of notice of a miners' meeting, organizing a miners' district in said county, with a description of the boundaries thereof, to record the same in a book, to be kept in his office, as other county records, to be called a 'book of record of mining claims'; and upon the petition of parties interested, he may appoint a deputy for such district, who shall reside in said district or its vicinity, and shall record all mining claims and water rights, in the order in which they are presented for record, and shall transmit a copy of such record, at the end of each month, to the county clerk, who shall record the same in the above-mentioned book of record, for which he shall receive one dollar for each and every claim. It shall further be the duty of said county clerk to furnish a copy of this law to his said deputy, who shall keep the same in his office, open at all reasonable times for the inspection of all persons interested therein.

"Section 6. *Miners shall be empowered to make local laws in relation to the possession of water rights, the possession and working of placer claims, and the survey and sale of town lots in mining camps, subject to the laws of the United States.*

"Section 7. *That ditches used for mining purposes, and mining flumes permanently affixed to the soil, be and they are hereby declared real estate, for all intents and purposes whatever.*

"Section 8. That the laws relative to the sale and transfer of real estate, and the application of the liens of mechanics and laborers therein, be and they are hereby made applicable to said ditches and flumes, Provided, That all interests in mining claims, known as placer or surface diggings, may be granted, sold and conveyed by bill of sale, and delivery of possession, as in cases of the sale of personal property; Provided, further, That the bills of sale or conveyances executed on the sale of any placer or surface mining claim, shall be recorded within thirty days after the date of such sale, in the office of the county clerk of the county in which such sale is made, in a book to be kept by the county clerk for that purpose to be called the record of conveyances of mining claims.

"Section 9. Mortgages of interests in placer or surface mining claims shall be executed, acknowledged, recorded and foreclosed as mortgages of chattels.

"Section 10. The county clerk shall be entitled to a fee of one dollar each, for every conveyance or mortgage recorded under the provisions of this act." *(Deady's Code, p. 812.)*

"An act to provide for the appropriation of water from the lakes and running streams of the State of Oregon for purposes of irrigation and supplying water for household and domestic use, and for watering livestock upon dry lands, and making charges for water supplied; allowing the condemnation of lands for right of way; prescribing the manner of making appropriations and effecting condemnation of lands; allowing the condemnation of rights of riparian proprietors arising from their location; regulating the manner of constructing and operating ditches or canals, flumes, reservoirs, distributing ditches and feeders; prescribing right of recovery of damages resulting from the construction and operation of the same; securing the protection of highways; granting a lien upon crops raised by irrigation, and providing for its enforcement; declaring all such ditches or canals or flumes to be real estate, and providing for conveyances of the same; providing punishment for trespassers; prescribing the manner of settlement of conflicting rights by suit, and granting right of way over State lands.

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. That the use of the water of the lakes and running streams of the State of Oregon for general rental, sale or distribution for purposes of irrigation and supplying water for household and domestic consumption and watering livestock upon dry lands of the State, is a public use, and the right to collect rates or compensation for such use of said water is a franchise. A use shall be deemed general within the purview of this act when the water appropriated shall be supplied to all persons whose lands lie adjacent to

or within reach of the line of the ditch or canal or flume in which said water is conveyed, without discrimination other than priority of contract, upon payment of charges therefor, as long as there may be water to supply.

"Section 2. A corporation organized for the construction and maintenance of a ditch or canal or flume for general irrigation purposes, and other purposes above described, may appropriate and divert water from its natural bed or channel and condemn right of way for its ditch or canal or flume, and may condemn the rights of riparian proprietors upon the lake or stream from which such appropriation is made, upon complying with the terms of this act. Such corporation shall also have the right to condemn lands for the sites of reservoirs for storing water for future use, and for rights of way for feeders carrying water to such reservoirs, and for ditches carrying the same away, and distributing ditches, and shall have the right to take from any running stream in this State and store away any water not needed for immediate use by any person having a superior right thereto.

"Section 3. Such corporation may enter upon any land for the purpose of locating a point of diversion of the water intended to be appropriated, and upon any land lying between such point and the lower terminus of its proposed ditch or canal or flume for the purpose of examining the same and of locating and surveying the line of such ditch or canal or flume, together with the lines of necessary distributing ditches and feeders for reservoirs, and to locate and determine the sites for reservoirs for storing water.

"Section 4. When a point of diversion shall have been selected, such corporation shall post in a conspicuous place thereat a notice in writing containing a

statement of the name of the ditch or canal or flume and of the owner thereof, the point at which its headgate is proposed to be constructed, a general description of the course of said ditch or canal or flume, the size of the ditch or canal or flume, in width and depth, the number of cubic inches of water by miner's measurement under a six-inch pressure intended to be appropriated, and the number of reservoirs, if any.

"Section 5. Within ten days from the date of posting such notice, such corporation shall file for record in the office of the county clerk or recorder of conveyances, as the case may be, of the county in which said ditch or canal or flume, distributing ditches, reservoirs and feeders, are situated, a similar notice, and at the same time shall file a map showing the general route of said ditch or canal or flume; and in case said ditch or canal or flume, distributing ditches, reservoirs and feeders shall not lie wholly in one county, such notice and map shall be filed in the office of the county clerk or recorder of conveyances of each county in which any portion of said ditch or canal, flume, distributing ditches, reservoirs and feeders may be situated. Within sixty days from the completion of such ditch or canal or flume such corporation shall in like manner file a map of definite location of said ditch or canal or flume by legal subdivisions of the land traversed thereby, in case it is surveyed with the points of location of reservoirs, if any, designated thereon. It shall be the duty of every county clerk or recorder of conveyances, immediately upon the filing of such notice in his office, to record the same in a book kept for such purpose, and he shall file and preserve such maps among the records of his office.

"Section 6. When such corporation shall have acquired the right to appropriate water in the manner

hereinbefore provided, it may proceed to condemn lands and premises necessary for right of way for its ditch or canal or flume, and likewise for its distributing ditches and feeders and for sites for reservoirs; but right of way for the main line of said ditch or canal or flume shall not exceed one hundred feet in width, and for each distributing ditch or feeder thirty feet in width, and for a site for each reservoir twenty acres from one owner or for every ten thousand inches of water, miner's measurement, as aforesaid, or fraction thereof over half, of the capacity of the main ditch or canal or flume for every twenty miles of its length.

"Section 7. Whenever any corporation, authorized as hereinbefore provided to appropriate water and to construct and maintain a ditch or canal or flume for irrigation purposes, and for the purpose of supplying water for household and domestic use and for watering stock, and to condemn lands for right of way and sites for reservoirs, is unable to agree with the owner of such lands as to the compensation to be paid therefor, or if such owner be absent from the State or incapable of acting, such corporation may maintain an action in the circuit court of the county in which the lands sought to be appropriated or some portion thereof are situated, for the purpose of having such lands appropriated to its use, and for determining the compensation to be paid to such owner therefor. The proceedings in such action to final determination shall be the same as those prescribed by title III of Chapter XXXII of the Miscellaneous Laws of Oregon, as found in Volume 2 of the Annotated Laws of Oregon, compiled by W. Lair Hill.

"Section 8. Such corporation may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it

proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location. Such actions shall be brought in the county where the lands to be affected or some portion thereof are situated, and the manner of procedure therein shall be similar to that prescribed in the preceding section for condemnation of lands; but no person owning lands lying contiguous to any stream shall, without his consent, be deprived of water for household or domestic use, or for the purpose of watering his stock, or of water necessary to irrigate crops growing upon such lands, and actually used therefor.

"Section 9. Within six months from the date of the posting of the notice above prescribed, the corporation proposing to appropriate the water therein mentioned shall commence the actual construction of its proposed ditch or canal or flume, and shall prosecute the same without intermission except as resulting from the act of God, the elements or unavoidable casualty, until the same be completed; and the actual capacity of said ditch or canal or flume, when completed, shall determine the extent of the appropriation, anything contained in the notice to the contrary notwithstanding. Upon a compliance with the provisions of this act, the right to the use of the water appropriated shall relate back to the date of posting said notice.

"Section 10. All existing appropriations of water made for beneficial purposes by any person, corporation or company in accordance with the laws of the United States, or in accordance with the laws of the State of Oregon or the decisions of its supreme court, or the established customs and regulations of the district in which such appropriations have been made, shall be respected and upheld to the extent of the

amount of water actually appropriated, nor shall any existing mill be deprived of its water-power however lawfully acquired, without the consent of its owner; and all controversies respecting rights to water under the provisions of this act shall be determined by the date of the appropriations as respectively made thereunder by the parties.

"Section 11. In case the channel of any natural stream shall become so cut out, lowered, turned aside or otherwise changed from any cause as to prevent any ditch or canal or flume or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from such natural stream, the corporation owning such ditch or canal, flume, or feeder shall have the right to extend the head of such ditch or canal, flume, or feeder to such distance upon the stream which supplies the same as may be necessary for securing a sufficient flow of water into the same, and for such purpose such corporation shall have the same right to maintain proceedings for condemnation of right of way for such extension as in case of constructing a new ditch, and the priority of right to take water from such stream through any ditch or canal, flume or feeder shall be unaffected in any respect by reason of a change in the place of diversion; provided, no such change shall interfere with the complete use or enjoyment of any other ditch or canal, flume or feeder lawfully constructed. And when from any cause the line of any ditch or canal, flume or feeder, as originally constructed, can no longer be maintained, the corporation owning the same may alter the course thereof, and for such purpose may condemn lands for right of way as in case of original construction.

"Section 12. Whenever any corporation organized as aforesaid shall find it necessary to construct its

ditch or canal, flume, distributing ditches or feeders across the improved or occupied lands of another, it shall select the shortest and most direct route practicable, having reference to cost of construction upon which said ditch or canal, flue, distributing ditches or feeders can be constructed with uniform or nearly uniform grade.

"Section 13. No tract or parcel of improved or occupied land in this State shall, without the written consent of the owner thereof, be subjected to the burden of two or more ditches or canals or flumes constructed under this act for the purpose of conveying water through said property when the same object can be feasibly and practically attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch or canal or flume; and any corporation having constructed a ditch or canal or flume for the purpose hereinbefore provided, shall allow other corporation to enlarge such ditch or canal or flume so as not to interfere with the operations of the corporation owning the same, and use such ditch or canal or flume in common with the corporation owning the same, upon payment to such corporation of a reasonable proportion of the cost of constructing and maintaining such ditch or canal or flume; such corporation shall be jointly liable to any person damaged along the line of common user by reason of the faulty construction of such portion of such ditch or canal or flume, and the corporation securing the use of the same shall be liable to the owner corporation for all damage by it sustained growing out of the enlargement of said ditch or canal or flume or the increased volume of water turned therein. Before proceeding to secure the right to make use of any portion of a ditch or canal or flume, the corporation seeking to secure

the same shall execute and deliver to the owner corporation a bond with sufficient sureties, in an amount equal to the original cost or construction and the estimated cost of enlargement of the portion of said ditch or canal or flume sought to be subjected to a double use, conditioned for the payment on demand to the owner corporation of a reasonable proportion of the original cost of construction of such portion of said ditch or canal or flume and of the cost of enlargement thereof, together with a reasonable proportion of the cost of its maintenance as enlarged, and of all damages that may at any time accrue to the owner corporation, and for which it shall have a right of recovery against said other corporation by reason of the provisions of this section; provided, that in case the corporation owner of said ditch, flume or canal shall object to the amount or sufficiency of the sureties on such bond, it shall serve upon the corporation desiring to use such ditch, flume or canal, within ten days after receiving said bond, a notice specifying particularly the objections thereto, and the sufficiency of the sureties or the amount of the bond shall be determined by the judge of the circuit court of the county where said ditch, canal or flume is situated, and said judge may hear evidence at chambers in relation.

"Section 14. Any corporation constructing a ditch or canal, flume, distributing ditches or feeders, under the provisions of this act, may make use of natural depressions in the earth along the line thereof to all intents and purposes as parts of said ditch or canal, flume, distributing ditches or feeders; and it may conduct the water appropriated by it along the channel of any natural stream, but not so as to raise the water thereof above ordinary high-water mark, and may take the same out again at any point desired without re-

gard to the prior rights of others to water from said stream; but due allowance shall be made for evaporation and scapage (escapement).

"'Section 15. Every corporation constructing a ditch or canal or flume under the provisions of this act shall be required to erect and keep in good repair a head-gate at the head of its ditch or canal or flume, which, together with the necessary embankments, shall be of sufficient height and strength to control the water at all ordinary stages. The frame work of such head-gate shall be of timber not less than four inches square, and the bottom, sides and gate or gates shall be of plank not less than two inches in thickness.

"Section 16. Every corporation constructing a ditch or canal, flume or reservoir under the provisions of this act, shall be liable for all damages done to the persons or property of others arising from leakage or overflow of water therefrom growing out of want of strength in the banks or walls, or negligence or want of care in the management of said ditch or canal, flume or reservoir; provided, that damage resulting from extraordinary and unforeseen action of the elements, or attributed in whole or in part to the wrongful interference of another with said ditch or canal, flume or reservoir, which may not be known to said corporation for such length of time as would enable it by the exercise of reasonable efforts to remedy the same, shall not be recovered against said corporation.

"Section 17. Any corporation constructing a ditch or canal or flume, under the provisions of this act, across any public highway or public traveled road shall put a good, substantial bridge not less than fourteen feet in breadth over such ditch or canal or

flume where it crosses said highway or road. Travel shall not be suspended by the construction of such ditch or canal or flume, and such bridge shall be completed within three days from the time said highway or road is intersected. In case such bridge is not so constructed and completed, it shall be the duty of the road supervisor of the road district in which the point of intersection is situated to construct said bridge, and he shall bring an action in his own name as supervisor for the use and benefit of his road district in any court of competent jurisdiction to recover the expense of constructing said bridge, and in such action, in addition to the costs and disbursements provided by statute, he shall recover such sum as the court, or justice, if the action be brought in a justice's court, may adjudge to be reasonable as attorney fees in said action. Appeals may be taken in such cases as in other actions.

"Section 18. Every corporation constructing a ditch or canal or flume under the provisions of this act, shall carefully keep and maintain the embankments and walls thereof, and of any reservoir constructed to be used in conjunction therewith, so as to prevent the water from wasting and from flooding or damaging the premises of others; and it shall not divert at any time any water for which it has not actual use or demand.

"Section 19. Such corporation may acquire the right of way across lands lying contiguous to its ditch or canal or flume, for distributing ditches in the manner hereinbefore provided, but it shall not be compelled so to do nor to construct distributing ditches upon any lands for the use of the owners thereof. But when any person shall construct a distributing ditch to the line of right of way for the ditch or canal or flume at any practicable point, and shall tender to

such corporation the rates usually charged consumers of water along the line of said ditch or canal or flume, for any amount of water said corporation may have in its ditch or canal or flume, or may have the right and ability to appropriate above the amount already sold, said corporation shall connect such distributing ditch with its ditch or canal or flume and turn therein the amount of water for which tender is made, and if it shall fail or refuse so to do, it shall be liable to such person for all loss or damage sustained by reason of the failure to procure such water. Such corporation shall not be liable for any loss or damage sustained by any person by reason of the defective construction or careless operation of distributing ditches not by it constructed or operated, and not occasioned in whole or in part by its wrongful or negligent act.

"Section 20. Any corporation acting under the provisions of this act which shall supply water to any person for the irrigation of crops, shall have a lien upon all crops raised by the use of such water for the reasonable value of the water supplied, which lien shall be a continuing one and shall bind said crops after as well as before the same have been gathered, and without record shall be preferred to all other liens or encumbrances upon said crops whatever. Such liens may be enforced by a suit in equity.

"Section 21. All ditches or canals and flumes permanently affixed to the soil, constructed under the provisions of this act, are hereby declared to be real estate, and the same or any interest therein shall be transferred by deed only, duly witnessed and acknowledged. The vendee of the same, or any interest therein, at any stage shall succeed to all the rights of his vendor and shall be subject to the same liabilities during his ownership.

"Section 22. The right to appropriate money (water) hereby granted may be lost by abandonment; and if any corporation constructing a ditch or canal or flume under the provisions of this act shall fail or neglect to use the same for the period of one year at any time it shall be taken and deemed to have abandoned its appropriation, and the water appropriated shall revert to the public and be subject to other appropriations in order of priority. But the question of abandonment shall be one of fact to be tried and determined as other questions of fact.

"Section 23. Any person who shall knowingly and wilfully cut, dig, break down or open any gate, bank, embankment or side of any ditch, canal, flume, feeder or reservoir constructed under the provisions of this act, the property of another, with intent maliciously to injure the owner of such property, or any other person, or for his or her own gain, by unlawfully causing the water contained in said ditch, canal, flume, feeder or reservoir to run or pour thereout with intent of stealing the same or appropriating it for his or her own gain, profit, benefit or advantage, without the consent of the owner thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten nor more than three hundred dollars, or by imprisonment in the county jail not less than one month nor more than one year. Justices' courts shall have jurisdiction of all prosecutions arising under this section. The person so trespassing shall also be liable for all damage caused by his act to the owner of said property or any person injured by his wrongful act.

"Section 24. In any suit which may hereafter be commenced for the protection of rights to water acquired under the provisions of this act, the plaintiff

may make any or all persons who have diverted water from the same stream or source parties to such suit, and the court may in one decree determine the relative priorities and rights of all parties to such suit. Any person claiming a right on said stream or source, not made a party to such suit, may become such on application to the court, when it is made to appear that he is interested in the result of the suit, and may have his right determined, and the court may, at any stage, on its own motion, require any or all persons having or claiming rights to water on said stream or source, to be brought in and made parties to said suit when it appears that a complete determination of the issue involved cannot be made without the presence of such person or persons.

"Section 25. The right of way, to the extent hereinbefore specified, for the ditches or canals, flumes, distributing ditches and feeders of any corporation appropriating water, under the provisions of this act, across any and all lands belonging to the State of Oregon and not under contract of sale, is hereby granted.

"Section 26. This act may at any time be amended by the legislative assembly, and commissioners for the management of water rights and the use of water may be appointed, and rates for the use of water may be fixed by the legislative assembly or by such commissioners; but rates shall not be fixed lower than will allow the net profits of any ditch or canal or flume or system thereof to equal the prevailing legal rate of interest on the amount of money actually paid in and employed in the construction and operation of said ditch or canal or flume or system thereof.

"Section 27. Inasmuch as the question of conflicting claims to the appropriation and use of the water of the streams and lakes of this State, for irrigation purposes and the other purposes hereinbefore enumerated, is a vexed one and should be speedily settled, this act shall take effect and be in force from and after its approval by the Governor.

"Filed in the office of the Secretary of State February 18, 1891." *(Laws 1891, p. 52).*

OREGON LAWS 1893

"An act to govern the priority of right to waste, spring, and seepage waters, defining the rights of owners of springs and seepage waters, authorizing riparian owners to employ wheels, pumps and other machinery for lifting water for irrigation, and declaring what uses of water shall have preference.

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. That all ditches now constructed, or hereafter to be constructed, for the purpose of utilizing the waste, spring, or seepage waters of the state, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the waters of running streams; provided, that the person upon whose lands the seepage or spring waters first arise, shall have the right to the use of such waters.

"Section 2. Any person who owns or has the possessory right to any land bordering on any lake or natural stream of water, shall have the right to employ wheels, pumps, hydraulic engines, or other ma-

chinery for the purpose of raising water to the level required for the use of such water in irrigating any land belonging to such owner; provided, that the use of such water shall not conflict with the better or prior right of any other person.

"Section 3. When the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall, subject to such limitations as may be prescribed by law, have the preference over those claiming such water for any other purpose; and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.

"Filed in the office of the Secretary of State, February 22, 1893." *(Laws 1893, p. 150.)*

OREGON LAW 1899

"An act to provide for the appropriation of water from the lakes and running streams of the state of Oregon for the purpose of developing the mineral resources of the state and for other purposes, and supplying water for that and other purposes; allowing the condemnation of lands for right of way for ditches, flumes, canals and pipe lines for conveying such water and reservoirs for the storage of same; prescribing the manner of making appropriations and effecting the condemnation of lands; allowing the condemnation of rights of riparian proprietors arising from their location; regulating the manner of constructing and operating such ditches, canals, flumes, reservoirs and pipe lines; prescribing right of recovery of damages resulting from the construction and operation of the same; securing the protection of highways, and providing punishment for trespassers; prescribing the manner of settlement of conflicting rights by suit, and granting the right of way over state lands.

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. That the use of the water of the lakes and running streams of the State of Oregon for the purpose of developing the mineral resources of the state and to furnish electrical power for all purposes is declared to be a public and beneficial use and a public necessity, and the right to divert unappropriated waters of any such lakes or streams for such public and beneficial use is hereby granted.

"Section 2. All persons, companies and corporations having title or possessory right to any mineral or other land, shall be entitled to the use and enjoyment of the water of any lake or running stream within the state for mining and other purposes in the developing of the min-

eral resources of the state or to furnish electrical power for any purposes; and such waters may be made available to the full extent of the capacity thereof without regard to deterioration in quality or diminution in quantity, so that such use of the same does not materially affect or impair the rights of prior appropriations.

"Section 3. All such persons companies and corporations may appropriate and divert such waters, and may condemn right of way for ditches, canals, flumes and pipe lines for the carrying of same, and may condemn the rights of riparian proprietors upon the lake or stream from which such appropriation is made, upon complying with the terms of this act. Such persons, companies and corporations shall also have the right to condemn lands for the sites of reservoirs for storing water for future use, and for rights of way for feeders carrying water to such reservoirs, and for ditches, canals, flumes or pipe lines carrying the same away, and shall have the right to take from any lake or running stream in this state and store away any water not previously appropriated or not needed for immediate use by any person having a superior right thereto.

"Section 4. Such persons companies and corporations may enter upon any land for the purpose of locating a point of diversion of the water intended to be appropriated, and upon any land lying between such point and the lower terminus of its proposed ditch, canal, flume or pipe line for the purpose of examining the same and of locating and surveying the line of such ditch, canal, flume or pipe line, together with the line of necessary distributing ditches and feeders for reservoirs, and to locate and determine the site for reservoirs for storing water.

"Section 5. When a point of diversion shall have been selected, such appropriator shall post in a conspicuous place thereat a notice in writing containing a statement of

the name of the ditch, canal, flume or pipe line and of the owner thereof, the point at which its headgate is proposed to be constructed, a general description of the course of said ditch, canal, flume or pipe line, the size or dimensions of the same in width, and depth, the number of cubic inches of water (by miners' measurement under a six-inch pressure) intended to be appropriated, and the number of reservoirs, if any.

"Section 6. Within ten days from the date of posting such notice, such appropriator shall file for record in the office of the county clerk or recorder of conveyances, as the case may be, of the county in which said ditch or canal or flume or pipe line, distributing ditches, reservoirs and feeders are situated, a similar notice, and at the same time shall file a map showing the general route of said ditch or canal or flume or pipe line; and in case said ditch or canal or flume or pipe line, distributing ditches, reservoirs and feeders shall not lie wholly in one county, such notice and map shall be filed in the office of the county clerk or recorder of conveyances of each county in which any portion of said ditch or canal, flume, pipe line, distributing ditches, reservoirs and feeders may be situated. Within sixty days from the completion of such ditch or canal or flume or pipe line such appropriator shall in like manner file a map of definite location of said ditch or canal or flume or pipe line, by legal subdivisions of the land traversed thereby in case it is surveyed, with the points of location of reservoirs, if any, designated thereon. It shall be the duty of every county clerk or recorder of conveyances, immediately upon the filing of such notice in his office, to record the same in a book kept for such purpose, and he shall file and preserve such maps among the records of his office.

"Section 7. When such person, company or corporation shall have acquired the right to appropriate water in the manner hereinbefore provided, it may proceed to condemn

lands and premises necessary for right of way for its ditch or canal or flume or pipe line, and likewise for its distributing ditches and feeders and for sites for reservoirs; but right of way for the main line of said ditch or canal or flume or pipe line shall not exceed fifty feet in width, and for each distributing ditch or feeder thirty feet in width, and for a site for each reservoir twenty acres from one owner, or for every ten thousand inches of water (miners' measurement as aforesaid), or fraction thereof over half, of the capacity of the main ditch or canal or flume or pipe line for every twenty miles of its length.

"Section 8. Whenever any person, company or corporations authorized as hereinbefore provided to appropriate water and to construct and maintain a ditch or canal or flume or pipe line for mining purposes or to furnish electrical power for any purpose, and to condemn lands for right of way and sites for reservoirs, is unable to agree with the owner of such lands as to compensation to be paid therefor, or if such owner be absent from the state or incapable of acting, such person, company or corporation may maintain an action in the circuit court of the county in which the lands sought to be appropriated or some portion thereof are situated, for the purpose of having such lands appropriated to its use and for determining the compensation to be paid to such owner therefor. The proceedings in such action, to final determination shall be the same as those prescribed by title III of chapter XXXII of the miscellaneous laws of Oregon, as found in volume II of the annotated laws of Oregon, compiled by W. Lair Hill.

"Section 9. Such persons, companies and corporations may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location. Such action shall be brought in the county where the—

"Section 10. Within six months from the date of the posting of the notice above prescribed, the persons, companies and corporations proposing to appropriate the water therein mentioned shall commence the actual construction of their or its proposed ditch or canal or flume or pipe line, and shall prosecute the same without intermission (except as resulting from the act of God, the elements or unavoidable casualty) until the same be completed; and the actual capacity of said ditch or canal or flume or pipe line when completed shall determine the extent of the appropriation, anything contained in the notice to the contrary notwithstanding. Upon a compliance with the provisions of this act, the right to the use of the water appropriated shall relate back to the date of posting said notice.

"Section 11. All existing appropriations of water made for beneficial purposes by any persons, corporation or company, in accordance with the laws of the United States or in accordance with the laws of the State of Oregon or the decisions of the supreme court, or the established customs and regulations of the district in which such appropriations have been made, shall be respected and upheld to the extent of the amount of water actually appropriated, nor shall any existing mill be deprived of its water power, however lawfully acquired, without the consent of its owner; and all controversies respecting rights to water under the provisions of this act shall be determined by the date of the appropriations as respectively made thereunder by the parties.

"Section 12. In case the channel of any natural stream shall become so cut out, lowered, turned aside or otherwise changed, from any cause, as to prevent any ditch or canal or flume or pipe line or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from such natural stream, the persons, companies or corporations owning such ditch or canal or pipe line, flume or feeder shall have the right to extend the head of

such ditch or canal or pipe line, flume or feeder to such distance upon the streams which supplies the same as may be necessary for securing a sufficient flow of water into the same; and for such purpose such persons, companies or corporations shall have the same right to maintain proceedings for condemnation of right of way for such extension as in case of constructing a new ditch, and the priority of right to take the water from such stream through any ditch or canal or pipe line, flume or feeder shall be unaffected in any respect by reason of a change in the place of diversion; provided, no such change shall interfere with the complete use or enjoyment of any other ditch or canal, pipe line, flume or feeder lawfully constructed. And when from any cause the line of any ditch or canal, pipe line, flume or feeder along the line of common user, by reason of the faulty construction of such portion of such ditch, canal, flume or pipe line and the persons, companies or corporations securing the use of the same shall be liable to the owner persons, companies or corporations for all damages by it sustained growing out of the enlargement of said ditch, canal, flume or pipe line, or the increased volume of water turned therein. Before proceeding to secure the right to make use of any portion of the ditch, canal, flume or pipe line, the persons, companies or corporations seeking to secure the same shall execute and deliver to the owner persons, companies or corporations a bond with sufficient sureties in an amount equal to the original cost of construction and the estimated cost of enlargement of the portion of said ditch, canal, flume or pipe line, sought to be subjected to a double use, conditional for the payment on demand to the owner persons, companies or corporations of a reasonable proportion of the original cost of construction of such portion of said ditch, canal, flume or pipe line and of the cost of enlargement thereof, together with a reasonable proportion of the cost of its maintenance as enlarged and of all

damages that may at any time accrue to the owner persons or companies or corporations and for which it shall have a right of recovery against said other persons, companies or corporations by reason of the provisions of this section; provided, that in case the persons, companies or corporations owning said ditch, canal, flume or pipe line shall object to the amount or sufficiency of the sureties on such bond it shall serve upon the corporations, companies or persons desiring to use such ditch, canal, flume or pipe line within ten days after receiving said bond a notice specifying particularly the objections thereto, and the sufficiency of the sureties or the amount of the bond shall be determined by the judge of the circuit court of the county where said ditch, canal, flume or pipe line is situated, and said judge may hear evidence at chambers in relation (* * *) as originally constructed can no longer be maintained, the persons, companies or corporations owning the same may alter the course thereof and for such purpose may condemn lands for right of way as in case of original construction.

"Section 13. Whenever it becomes necessary to construct any ditch, canal, flume, pipe line, distributing ditches or feeders across the improved or occupied lands of another, under the provisions of this act, such persons, companies or corporations shall select the shortest and most direct route practicable, having reference to cost of construction, upon which said ditch, canal, flume, pipe line, distributing ditches or feeders can be constructed with uniform or nearly uniform grade.

"Section 14. No tract or parcel of improved or occupied land in this state shall, without the written consent of the owner thereof, be subjected to the burden of two or more ditches or canals, flumes or pipe lines constructed under this act for the purpose of conveying water through said property when the same object can be feasibly and prac-

tically attained (by) uniting and conveying all the water necessary to be conveyed through such property in one ditch, canal, flume or pipe line, and any persons, companies or corporations having constructed a ditch, canal, flume or pipe line for the purpose hereinbefore provided shall allow any other persons, companies or corporations to enlarge such ditch, canal, flume or pipe line, so as not to interfere with the operations of the persons, companies or corporations owning the same, and use such ditch, canal, flume or pipe line in common with the persons, companies or corporations owning the same, upon payment to such persons, companies or corporations of a reasonable proportion of the cost of constructing and maintaning such ditch, canal, flume or pipe line. Such persons, companies or corporations shall be jointly liable to any person damaged.

"Section 15. In constructing a ditch, canal, flume or pipe line, distributing ditches or feeders, under the provisions of this act, the owner or owners thereof may make use of natural depressions in the earth along the line thereof to all intents and purposes as parts of said ditch, canal, flume or pipe line, distributing ditches or feeders; and it may conduct the water appropriated by it along the channel of any natural stream, but not so as to raise the water thereof above ordinary high-water mark, and may take the same out again at any point desired without regard to the prior rights of others to water from said stream, but due allowance shall be made for evaporation and seepage.

"Section 16. The owner or owners of every ditch, canal, flume or pipe line constructed under the provisions of this act shall be required to erect and keep in good repair a headgate at the head of its ditch, canal, flume or pipe line, which, together with the necessary embankments, shall be of sufficient height and strength to control the water at all ordinary stages. The framework of such headgate

shall be of timber not less than four inches square, and the bottom, sides and gate or gates shall be of plank not less than two inches in thickness.

"Section 17. The owner or owners of every ditch, canal, flume or pipe line constructed under the provisions of this act shall be liable for all damages done to the persons or property of others, arising from leakage or overflow of water therefrom growing out of want of strength in the banks or walls, or negligence or want of care in the management of said ditch, canal, flume or pipe line or reservoir; provided, that damage resulting from extraordinary and unforeseen action of the elements, or attributed in whole or in part to the wrongful interference of another with said ditch, canal, flume, pipe line or reservoir, which may not be known to said corporation for such length of time as would enable it by the exercise of reasonable efforts to remedy the same, shall not be recovered against said corporations, companies or persons.

"Section 18. The owner or owners of every ditch, canal, flume or pipe line constructed under the provisions of this act across any public highways or public traveled road shall put a good substantial bridge, not less than fourteen feet in breadth, over such ditch, canal or flume where it crosses said highway or road. Travel shall not be suspended by the construction of said ditch, canal, flume or pipe line, and such bridge shall be completed within three days from the time said highway or road is intersected. In case such bridge is not so constructed and completed, it shall be the duty of the road supervisor of the road district in which the point of intersection is situated to construct said bridge, and he shall bring an action in his own name as supervisor for the use and benefit of his road district, in any court of competent jurisdiction, to recover the expense of constructing said bridge; and in such action, in addition to the costs and disbursements provided by

statute, he shall recover such sum as the court or justice, if the action be brought in a justice's court, may adjudge to be reasonable as attorney fees in said action. Appeals may be taken in such cases as in other actions.

"Section 19. The owner or owners of every ditch, canal, flume or pipe line constructed under the provisions of this act shall carefully keep and maintain the embankments and walls thereof, and of any reservoir constructed to be used in conjunction therewith, so as to prevent the water from wasting and from flooding or damaging the premises of others; and it shall not divert at any time any water for which it has not actual use or demand.

"Section 20. The right to appropriate water hereby granted may be lost by abandonment; and if any persons, companies or corporations constructing a ditch, canal, flume or pipe line under the provisions of this act shall fail or neglect to use the same for a period of two years at any time, it shall be taken and deemed to have abandoned its appropriation, and the water appropriated shall revert to the public and be subject to other appropriations in order of priority. But the question of abandonmnt shall be one of fact, to be tried and determined as other questions of fact.

"Section 21. Any person who shall knowingly and willfully cut, dig, break down or open any gate, bank, embankment or side of any ditch, canal, flume or pipe line, feeder or reservoir constructed under the provisions of this act, the property of another, with intent maliciously to injure the owner or owners of such property or any other person, or for his or her own gain, by unlawfully causing the water contained in said ditch, canal, flume, pipe line, feeder or reservoir to run or pour thereout with intent of stealing the same or appropriating it for his or her own gain, profit, benefit or advantage, without the consent of the owner or owners thereof, shall be deemed guilty of a

misdemanor, and upon conviction thereof shall be punished by a fine of not less than $10 nor more than $300, or by imprisonment in the county jail, not less than one month nor more than one year. Justices' courts shall have jurisdiction of all prosecutions arising under this section. The person so trespassing shall also be liable for all damage caused by his or her act to the owner or owners of said property, or any person or persons injured by his or her wrongful act.

"Section 22. In any suit which may hereafter be commenced for the protection of rights to water acquired under the provisions of this act, the plaintiff may make any and all persons who have diverted water from the same stream or source parties to such suit, and the court may in one decree determine the relative priorities and rights of all parties to such suit. Any person claiming a right on said stream or source, not made a party to such suit, may become such on application to the court, when it is made to appear that he is interested in the result of the suit, and may have his right determined; and the court may, at any stage, on its own motion, require any or all persons having or claiming rights to water on said stream or source to be brought in and made parties to said suit, when it appears that a complete determination of the issue involved can not be made without the presence of such person or persons.

"Section 23. The right of way, to the extent hereinbefore specified, for the ditches or canals, flumes, pipe lines, distributing ditches and feeders of any persons, companies or corporations appropriating water under the provisions of this act, across any and all lands belonging to the State of Oregon, and not under contract of sale, is hereby granted.

"Section 24. Inasmuch as this state contains large tracts of mineral lands which can not be successfully worked or

the mineral extracted therefrom without the use of water, and the working of said mining properties will largely increase the wealth of this state; and whereas, the appropriation and use of the water of the streams and lakes of this state for the purpose of developing its mineral resources, and the right to build ditches, canals, flumes, pipe lines and reservoirs in connection with such appropriation and use, and the right to condemn lands necessary for the right of way and maintenance thereof are uncertain and vexed questions and should be speedily settled, therefore, an emergency exists, and this act shall take effect and be in force from and after its approval by the governor.

"Approved February 18, 1899."

(Laws of 1899, p. 172.)

OREGON LAW 1905

"An act to provide for the appropriation of water; granting right of eminent domain to the United States in certain cases; providing for the adjudication of certain water rights; providing for the appointment of a State Engineer, his qualifications, duties, salaries, and the records and fees of his office; providing for hydrographic and topographic surveys; appropriating certain funds; providing for the disposition of certain State lands and rights of way over same; and repealing all acts in conflict with this act.

"Be it enacted by the People of the State of Oregon:

"Section 1. Appropriation of Water. Any person, association, or corporation hereafter intending to acquire the right to the beneficial use of any waters for the reclamation of arid lands, shall post in a conspicuous place at the proposed point of diversion a written or printed notice containing the name of such applicant and the stream or other source of supply of such water, a brief description of the point of diversion and the nature of the beneficial use to which such waters are to be applied, and the exact date of posting, and shall within fifteen days thereafter file in the office of the clerk of the county in which such notice is posted, a duplicate thereof so attested, and shall within thirty days thereafter file in the office of the State Engineer a certified copy of such duplicate as filed in the office of the county clerk, which shall be accompanied by such information, maps, field notes, plans and specifications as may be necessary to show the method of construction. All such maps, field notes, plans, and specifications shall be made from actual surveys and measurements, and shall be retained in the office of the State Engineer; provided, that appropriation of water by the United States shall be made as provided in Section 2.

"Section 2. Appropriation of water by United States. Whenever the proper officers of the United States, authorized by law to construct works for the utilization of water within this State, shall file in the office of the State Engineer a written notice that the United States intends to utilize certain specified waters, the waters described in such notice and unappropriated at the time of the filing thereof shall not be subject to further appropriation under the laws of this State, but shall be deemed to have been appropriated by the United States; provided, that within a period of three years from the date of filing such notice the proper officer of the United States shall file final plans of the proposed works in the office of the State Engineer for his information; and provided further, that within four years from the date of such notice the United States shall authorize the construction of such proposed work. No adverse claims to the use of the water required in connection with such plans shall be acquired under the laws of this State except as for such amount of said waters described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized, which release shall also be filed in the office of the State Engineer. In case of failure of the United States to file such plans or authorized construction of such works within the respective periods herein provided, the waters specified in such notices, filed by the United States, shall become subject to appropriation by other parties. Notice of the withdrawal herein mentioned shall be published by the State Engineer in a newspaper published and of general circulation in the stream system affected thereby, and a like notice upon the release of any lands so withdrawn, such notices to be published for a period not exceeding thirty days.

"Section 3. Adjudication of Water Rights. In any stream system where construction is contemplated by the United States under the Act of Congress, approved June

17, 1902, and known as the Reclamation Act, the State Engineer shall make a hydrographic survey of such stream system, and shall deliver an abstract thereof, together with an abstract of all data necessary for the determination of all rights for the use of the waters of such system, to the Attorney General of the State. The Attorney General, together with the district attorneys of the district affected by such stream system shall, at the request of the Secretary of the Interior, enter suit on behalf of the State of Oregon, in the name of the State, for the determination of all rights for the use of such waters, and shall diligently prosecute the same to a final adjudication.

"Section 4. Parties and Costs of Suits. In any suit wherein the State is a party, for the determination of a right to the use of the waters of any stream system, all who claim the right to use such waters shall be made parties. When any such suit has been filed the court shall call upon the State Engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided, in order to obtain all data necessary to the determination of the rights involved. The disbursements made in litigating the rights involved in such suit shall be taxed by the court as in other equity suits.

"Section 5. Decrees Adjudicating Water Rights. Upon the adjudication of the rights to the use of the water of a stream system, a certified copy of the decree shall be prepared by the clerk of the court, without charge, and filed in the office of the State Engineer. Such decree shall in every case declare, as to the water right adjudged to each party, whether riparian or by appropriation, the extent, the priority, amount, purpose, place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

"Section 6. State Engineer, Appointment, Duties, Qualifications, and Salary. A State Engineer, technically qualified and experienced as an hydraulic engineer, shall be appointed by the Governor upon the recommendation of the director of the United States geological survey and confirmed by the Senate. He shall hold office for the term of four years from and after his appointment, unless sooner removed by the Governor for cause, and until his successor shall have been elected and shall have qualified. He shall have general supervision of all the measurements and records of appropriation of waters of the State, and of all surveys and engineering work in which the State may be interested, and for which funds are provided, and shall perform all work in connection therewith. He shall receive a salary of $2,400 per annum and actual and necessary traveling expenses, while away from his office in the discharge of official duties, and shall not engage in private practice. He may employ assistants and purchase materials and supplies necessary for the proper conduct and maintenance of his office and department, in pursuance of appropriations as made from time to time for such purposes. The salaries and expenses of the office of the State Engineer shall be paid at the same time and in the same manner as those of other officers of the State. The office of the State Engineer shall be located at the seat of government in the capitol building. The State Engineer and his authorized assistants and agents, may enter upon any private property for the performance of their respective duties, doing no unnecessary injury thereto. The State Engineer shall prepare and deliver to the Governor on or before November 30th of the year preceding the regular session of the legislature, and at other times when required by the Governor, a full report of the work of his office, including a detailed statement of the expenditures thereof, with such recommendations for legislation as he may deem advisable.

"Section 7. Oath and Bond of State Engineer. Before entering upon the duties of his office the State Engineer shall give bond to the State with sufficient sureties in the sum of $5,000 for the faithful performance of his duties, which bond shall be approved by and filed in the office of the Secretary of State, together with the following oath of office: 'I, ..., being duly sworn, do say that I am the duly appointed State Engineer of the State of Oregon, and that I will faithfully and honestly perform the duties of such office, and that I am not directly or indirectly, pecuniarily or otherwise interested with any person, association, or corporation using or to use any of the waters of the State for any beneficial purpose, in such use thereof, and will not during my term of office become so interested therein, or receive any pecuniary aid or benefit therefrom, and shall not permit any assistant employed by me to be or become so interested or receive any pecuniary aid or benefit from such person, association, or corporation while so employed.'

"Section 8. Records of State Engineer. The records of the office of the State Engineer are public records and shall remain on file in his office and be open to the inspection of the public at all times during business hours. Such records shall show in full all maps, profiles, and engineering data relating to the use of water, and certified copies thereof shall be admissible as evidence in all cases where the original would be admissible as evidence.

"Section 9. Fees of State Engineer. The State Engineer shall receive the following fees, to be collected in advance, and to be paid by him into the general fund of the State Treasury on the last day of March, June, September, and December of each year:

"(a) For filing and recording notice of an appropriation of water, map and field notes of the same, $5.00.

"(b) For blue print copy of any map, drawing, ten cents per square foot or fraction thereof. For other copies of drawings or any data furnished upon application, actual cost of work.

"(c) For certifying to such copies, $1.00 for each certificate.

"(d) For such work as may be required of his office, the fees provided by law.

"Section 10. Hydrographic and Topographic Surveys and Cooperation with the United States Government. The State Engineer shall make hydrographic and topographic surveys and investigations of each stream system and source of water supply in the State, beginning with those most used, obtaining and recording all available data pertaining to the water supply of this State. He is hereby authorized, to cooperate with the agencies of the United States Government engaged in similar surveys and investigations, and in the construction of works for the development and use of the water supply of this State, expending for such purposes any money available for the work of his office.

"For the purpose of making hydrographic and topographic surveys, there is hereby appropriated out of any moneys in the treasury not otherwise appropriated the sum of $2,500 annually for such hydrographic and $2,500 annually for such topographic surveys, such appropriations, however, being contingent upon the United States Government making a like apportionment for such purposes to be expended within the State.

"Section 11. Disposition of State Lands. No lands belonging to the State, within the areas to be irrigated from work constructed or controlled by the United States, or its duly authorized agents, shall hereafter be sold except in conformity with the classification of farm units by the

United States, and the title of such land shall not pass from the State until the applicant therefor shall have fully complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to use water from such works, and shall produce the evidence thereof duly issued. After the withdrawal of lands by the United States for any irrigation project, no application for the purchase of State lands within the limits of such withdrawal shall be accepted, except under the conditions prescribed under that section. Any State lands needed by the United States for irrigation works shall be conveyed to the United States without charge.

"Section 12. Right of Way Over State Lands. There is hereby granted over all the unimproved lands now or hereafter belonging to the State the necessary right of way for ditches, canals, and reservoir sites for irrigation purposes constructed by authority of the United States or otherwise. All conveyances of State land hereafter made shall contain a reservation of such right of way and reservoir sites.

"Section 13. Appropriations. There is hereby appropriated out of the moneys in the general fund of the State Treasury, not othewise appropriated, the sum of five thousand dollars annually, or so much thereof as may be necessary for the salary and expenses of the State Engineer and the services of assistants, and expenses of the office and department of the State Engineer.

"Section 14. But nothing in this act shall be construed as rescinding the cession by the State to the United States of lands, as provided in the act known as House Bill No. 1, passed by the Twenty-third Regular Session of the Oregon Legislature.

"Filed in the office of the Secretary of State, February 22, 1905."

(Laws of 1905, pp. 401-408.)

"An act providing for granting franchises of water power by the State, and collecting fees therefor.

"Be it enacted by the People of the State of Oregon.

"Section 1. All water within the State from all sources of water supply belong to the public.

"Section 2. That every person, firm or corporation except municipal corporations (hereinafter call the appropriator), who shall appropriate water after the passage of this act, for the purpose of applying the same to the development of power, shall during the life of such appropriation as fixed herein pay to the State of Oregon not less than twenty-five cents or more than two dollars per annum in advance, on or before the second day of January of each year, for each and every horsepower represented by the said appropriation. The amount of the payment shall be determined by the Board of Control and adjusted from time to time, based upon the percentage of power appropriated which is put to beneficial use. For the purpose of this act, a horsepower is hereby defined to be 550 pounds of water per second of time for each foot of available fall.

"Section 3. The appropriator shall pay to the Board of Control the fees required by Section 2 of this act, proportionate to the remainder of the current year, and no appropriation of water for power purposes shall be deemed complete until such payment of fees is made. Immediately upon the receipt of such fees the Board of Control shall pay them over to the State Treasurer, taking his receipt therefor, who shall place the same in the general fund of the State Treasury. On or before the second day of January of each year thereafter, every appropriator of water for power purposes shall forward to the Board of Control the fees provided for in Section 2 of this act.

"Section 4. Upon the completion of the appropriation of water for power purposes, as now or hereafter provided by law, and compliance with the provisions of this act, the appropriator thereof shall own and enjoy all of the uses thereof so long as he pays the annual fees therefor, herein required, for a term not exceeding forty years from the date of appropriation, and shall have a preference right to reappropriate such water under such conditions as may be prescribed by law at the expiration of such term of years provided all fees have been paid. If any appropriator shall fail to pay any annual fee, or shall fail or refuse to renew the appropriation at its expiration, the State shall have a preference lien therefor prior to all other liens or claims, except for taxes, upon the improvements of the appropriation for developing and applying such appropriation of water and the real estate upon which the same are located, and upon notice from the Board of Control, the Attorney General shall proceed to foreclose the lien and collect any unpaid fees in the same manner as other liens or real property are foreclosed, and the water shall be again subject to appropriation.

"Section 5. Any person, firm or corporation who believes himself or itself injured in any material right by any decision of the Board of Control shall have the right of appeal from such decision to the circuit court for the county in which the proposed appropriation of water is situated.

"Section 6. In case the Board of Control is not created by law, with power to supervise the appropriation, distribution and use of the water of the State, then the duties imposed upon the Board of Control, as prescribed by this act, shall devolve upon and be assumed by the State Engineer.

"Filed in the office of the Secretary of State, February 24, 1909."

(Laws of 1909, p. 370.)

"An act providing for the payment of an annual license fee to the State by claimants to the use of water for power purposes where the water was applied to power generation, and the power generated prior to the 22d day of May, 1909, with suitable penalties for failure to pay the same, and providing the manner for collecting the same.

"Be it enacted by the People of the State of Oregon:

"Be it enacted by the Legislative Assembly of the State of Oregon:

"Section 1. Every person, firm, corporation or association hereinafter called 'claimant', claiming the right to the use of water for power development where said water was applied to the development or generation of power, and the power generated thereby prior to the 22nd day of May, 1909, shall on or before the 1st day of January, 1912, and on or before the 1st day of January of each year thereafter, pay to the State of Oregon in advance an annual license fee based upon the theoretical water horsepower claimed under each and every separate claim to water, graduated as follows, to-wit: Ten cents for each and every theoretical water horsepower up to 100, inclusive; five cents for each and every theoretical water horsepower in excess of 100 and up to and including 1,000; and one cent for each and every theoretical water horsepower in excess of 1,000; provided, however, upon filing the statement as hereinafter provided, the United States, or the State, or any municipal corporation, claiming the right to the use of water to any extent for the generation of power, or any other claimant to the right to use water for the generation of 25 theoretical water horsepower, or less, shall be exempted from the payment of all fees herein provided.

"Section 2. The fees herein provided shall be paid to the State Engineer in advance, and shall be accompanied by a written statement showing the extent of such claim. Said statement shall set forth the name and address of the claimant; the name of the stream from which the water is appropriated or claimed for power development; a description of the forty acres, or smallest legal subdivision in which the point of diversion and point of return are located; the date of the right as claimed; the maximum amount of water claimed expressed in cubic feet per second of time; the total average fall utilized under such claim; the manner of developing power, and the use to which the power is applied. If the regular flow is supplemented by water stored in a reservoir, the location of such reservoir, its capacity in acre-feet and the stream from which it is filled and fed, should be given, also the date of the right as claimed, for storage purposes.

"Should any claimant fail or neglect to file such statement within the time specified, or fail or neglect to pay such fees within the time specified, the fees due and payable shall be the amount specified in Section 1 of this act increased twenty-five per cent, and the State shall have a preference lien therefor, together with interest at the rate of ten per cent per annum from date of delinquency, upon the property of the claimant used, or necessaray for use, in the development of the right or claim, together with any improvements erected thereon for such development, and upon notice from the State Engineer, the Attorney General shall proceed to foreclose the lien and collect the amount due, as herein provided, in the same manner as other liens on real property are foreclosed.

"Section 3. The filing of a claim to water in excess of the amount to which the claimant is legally entitled shall not operate to vest in such claimant any right to the use of such excess water, nor shall the payment of the annual

license fees, provided for herein, operate to vest in any claimant any right to the use of such water beyond the amount to which claimant is legally entitled. The filing of any such claim to water shall be conclusive evidence as to the abandonment by the claimant of all rights to water for power purposes in excess of the claim as filed.

"Section 4. The amount of theoretical water horsepower upon which fees shall be paid under the provisions of this act shall be computed by multiplying the maximum amount of water claimed, expressed in cubic feet per second, by the average total fall utilized, expressed in feet, and dividing the product by 8.8.

"Filed in the office of the Secretary of State, February 23, 1911."

(Laws of 1911, p. 418.)

OREGON LAW 1913

"An act fixing the time within which a water right may be lost by failure to use the water appropriated.

"Be it enacted by the People of the State of Oregon:

"Section 1. Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State, and whenever hereafter the owner of a perfected and developed water right shall cease or fail to use the water appropriated, for a period of five successive years, the right to use shall thereupon cease, and such failure to use shall be conclusively presumed to be an abandonment of such water right, and thereafter the water which was the subject of use under such water right shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities; provided, that this act shall not apply to, or affect, the use of water, or rights of use, acquired by cities and towns in this State, by appropriation, or by purchase, for all reasonable and usual municipal purposes; and this act shall not be so construed as to impair any of the rights of such cities and towns to the use of water, whether acquired by appropriation or purchase, or heretofore recognized by act of the legislature, or which may hereafter be acquired; and the right of all cities and towns in this State to acquire rights to the use of the water of natural streams and lakes within the State, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is hereby expressly confirmed.

"Filed in the office of the Secretary of State, February 27, 1913."

(Laws of 1913, p. 531.)

WATER-SUPPLY PAPER 638-B, p. 35,
PUBLISHED BY THE UNITED STATE DEPARTMENT OF THE INTERIOR, 1932

Water-Power Resources of the Rogue River Drainage Basin, Oregon

By Benjamin E. Jones, Warren Oakey, and Harold T. Stearns

SUMMARY

The volcano whose crater is now occupied by Crater Lake, in southwestern Oregon, during its last active period poured forth volcanic ash that covered the country within a radius of about 25 miles. Rain and melting snow percolate easily into this light material, but after entering the ground the progress of the water is slow, and several months are required before it reaches the streams. Through the long dry season, therefore, run-off from the rains of the previous winter and spring is appearing in the creeks and rivers to maintain the flow, although there is no precipitation.

The Rogue River drains the western half of this area around Crater Lake. It rises at an altitude of about 5,000 feet and flows in a southwesterly direction for 210 miles to the Pacific Ocean. The drainage area is 5,080 square miles. The upper part of the basin is rough and wooded and has little tillable land. Its annual precipitation is 50 to 75 inches. This upper section furnishes practically all of the low-water flow of the river. The middle part of the basin constitutes the agricultural portion. Because of the low rainfall, 20 to 30 inches annually, and its seasonal distribution, very few crops can be raised without irrigation; yet when water is put on the land it is as productive as that in any other part of Oregon. Below the mouth of

the Applegate the river enters a more rugged region and flows in a fairly wide canyon containing little marketable timber and practically no tillable land except a few farms below Illahe.

The main tributaries of the Rogue River are the Applegate and Illinois Rivers. The Applegate River drains an agricultural area and during the summer is almost entirely used for irrigation. The Illinois River drains a mountainous area not far from the coast and is used to a slight extent for irrigation above Kerby; below that place it flows in a narrow canyon until it joins the Rogue River. The rainfall in the basin of the Illinois River amounts to about 68 inches, but there is a dry period from June to September, when the flow is very low, for the volcanic ash that acts as a reservoir on the upper Rogue River does not reach to the basin of the Illinois River.

Because of the character of its basin, the large and well-sustained flow, and the steep gradient, the Rogue River is well suited for use as a source of power. Field studies were made by the United States Geological Survey in 1923 and 1926 to determine the amount of power available and its relation to the public lands. Maps and profiles of the river have already been published, and a comprehensive scheme of development is outlined in this report. (See pls. 3 and 4 and Tables 1 and 2.) There are at present (1930) eight constructed power plants in the basin, of which four are on the main stream and four on tributaries. All these sites are capable of further development.

The principal plants are those at Prospect and Raygold, owned by the California-Oregon Power Co. A small plant at Gold Hill is used to pump water for the town. At Savage Rapids an irrigation company has erected a dam to raise the water level 20 feet for the double purpose of diverting water directly into a low-level canal for irriga-

tion and of supplying power to pump water to a high-level canal. The city of Ashland maintains a small municipal plant on Ashland Creek. The plants on Butte Creek and Mill Creek were erected to supply power to saw-mills, and one on Reuben Creek supplies a mine. The information concerning constructed plants in the Rogue River Basin is summarized in Table 1.

REPORT OF
THE STATE ENGINEER OF OREGON, 1930, P. 30
Streams on Which Findings Have Been Entered

Stream and County	Acreages	No. of Certificates Issued
Althouse Creek, Josephine	749	18
Anna Creek, Klamath	8,273	29
Bachart and Netter Creeks, Clackamas	50	2
Bridge Creek, Wheeler	2,405	...
Buck Creek, Lake	6,480	32
Burnt River, Baker	27,425	243
Butter Creek, Umatilla	7,712	62
Chenoweth Creek, Wasco	130	...
Cherry Creek, Klamath	712	1
Cherry Creek, Jefferson	306	2
Chewaucan River, Lake	34,745	113
Cochran Creek, Grant	35	5
Cottonwood Creek, Malheur	173	4
Cow Creek, Douglas	1,345	...
Crooked River, Crook	29,020	176
Deschutes River, Deschutes	119,499	...
Dugger Creek, Umatilla	534	27
East Branch Mud Creek, Umatilla	532	17
Fifteen Mile Creek, Wasco	1,848	87
Goodman Spring Branch, Umatilla	202	6
Goose Lake Streams, Lake	78,142	104
Grande Ronde River, Union	34,516	470
Helms Creek, Sherman	2	1
Hood River, Hood River	26,836	...
Imnaha River, Wallowa	9,043	...
John Day River, Grant and others	49,696	...
Johnson Creek, Umatilla	364	17
Little Butte Creek, Jackson	7,549	...
Lost River, Klamath	5,988	38
Malheur River, Malheur	46,947	215

Stream and County	Acreages	No. of Certificates Issued
Middle Branch Mud Creek, Umatilla	472	28
Mill Creek, Union	2,235	83
Mill Creek, Wasco	401	51
Mill Creek, Yamhill	14	23
Mosier Creek, Wasco	206	35
Neal Creek, Hood River	159	16
North Powder River, Baker and Union	20,995	97
Owyhee River, Malheur	34,500	107
Paulina Lake and Creek, Deschutes	704	14
Pine Creek, Umatilla	2,385	37
Pine Creek, Baker	19,261	...
Powder River, Baker	155,138	805
Rogue River, Jackson and Josephine	34,188	...
Silver Creek, Harney	24,377	...
Silvies River, Harney	87,566	...
Snow and Three Creeks, Deschutes	1,321	...
Sprague River, Klamath	11,572	...
South Branch Mud Creek, Umatilla	445	15
Squaw Creek, Deschutes	16,480	56
Sucker Creek, Josephine	2,162	51
Three Mile Creek, Wasco	28	10
Trout Creek, Jefferson	3,470	41
Tumalo Creek, Deschutes	28,178	57
Umatilla River, Umatilla	74,732	167
Walla Walla River, Umatilla	7,401	...
Wallowa River, Wallowa	38,680	261
Warner Lakes, Lake	50,280	...
West Prong Little Walla Walla River, Umatilla	562	32
White River, Wasco	15,512	115
Willow Creek, Morrow	6,291	156
Willow Creek, Malheur	27,602	87
Total	1,156,999	4,013

SUPREME COURT OF THE UNITED STATES.

No. 612.—October Term, 1934.

The California Oregon Power Company, Petitioner,
vs.
Beaver Portland Cement Company and City of Gold Hill, Oregon.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 29, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought by petitioner in a federal district court for Oregon against respondents, to enjoin them from interfering with the waters of Rogue River in the State of Oregon in any such way as to lessen the volume which flows over and along petitioner's land, and particularly from carrying on any drilling or blasting operations in the bed of the stream or removing rocks or other material therefrom. Following a trial, the district court made findings of fact and entered a decree denying the relief prayed for, except that respondents were enjoined from so carrying into effect their operations as to reduce the level of Rogue River below a designated elevation above sea level, and in another particular not necessary to be stated. The Circuit Court of Appeals affirmed the decree, 73 F. (2d) 555; and we brought the case here on certiorari, — U. S. —.

Rogue River is a non-navigable stream; and in its course flows through and between lands of petitioner on the east bank of the river and lands of respondents upon the west bank, the thread of the stream being the boundary between the two. Petitioner's lands were acquired by a predecessor in interest in 1885 by patent from the United States under the Homestead Act of May 20, 1862. The lands were purchased by petitioner and conveyed to it in 1921. Petitioner is a public-service corporation engaged in manufacturing and supplying electrical current to its customers. The City of Gold Hill, a municipal corporation, owns the lands on the west side of the river, and the Beaver Portland Cement Company is in possession of them, together with certain adjudicated water rights and permits issued from the office of the state engineer, under a

contract of sale from the city. The blasting complained of was all west of the thread of the stream, on respondents' property, and was for the double purpose of freeing the channel, incident to the use of the water rights adjudicated and permitted, and securing broken stone for a dam to be used in connection with a power plant which the cement company was about to build.

Neither petitioner nor any of its predecessors in interest has ever diverted the waters of the river for beneficial use on the real property or sought to make an actual appropriation thereof. The sole claim is based upon the common-law rights of a riparian proprietor, which petitioner says attached to the lands when the patent was issued to its first predecessor in title.

Petitioner insists that prior to the adoption of the Oregon Water Code of 1909, *infra*, the common-law rule that the riparian owner was entitled to the natural flow of the stream across or along the border of his land in its accustomed channel was recognized and in full force in the State of Oregon. Respondents contend to the contrary. Both cite many Oregon decisions and argue the matter at length. But an examination of the authorities leaves the question in doubt. In dealing with cases where the parties making conflicting claims were both riparian owners, the doctrine of the common law seems to have been recognized. Other cases appear to accept what is called a modified form of the common-law rule; and still other decisions apparently enforce the rule of appropriation. It is suggested by respondent that, prior to the adoption of the Water Code in 1909, the policy in respect of water rights was developing and the law on the subject of riparian rights was in a state of flux. There appears to be reason in the suggestion. But, in view of the conclusion to which we have come, it is unnecessary to pursue the inquiry further.

In 1909, the Water Code was adopted by the state legislature. Ore. Laws, 1909, Chap. 216. The act provides that all water within the state shall be subject to appropriation for beneficial use; but nothing therein is to be construed to take away or impair any vested right. In respect of a riparian proprietor, a vested right is defined "as an actual application of water to beneficial use prior to the passage of this act . . . to the extent of the actual application to beneficial use." The Code provides for the adjudication of water rights upon a petition to the state engineer. And

any court in which suit is brought to determine such rights may, in its discretion, transfer the case to the state engineer for determination. But no decision of the state engineer is to become final until confirmed by the court designated as having jurisdiction under the act. The procedural provisions of the act have been sustained as constitutional by this court. *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U. S. 440.

The court below held (1) that the homestead patent of 1885 carried with it the common-law right to have the stream continue to flow in its accustomed channel, without substantial diminution; but (2) that, while this was a substantial property right which could not be arbitrarily destroyed, it nevertheless was subject to the police power of the state and might be modified by legislation passed in the interest of the general welfare; and upon the latter ground the Water Code was upheld and the claims of respondents sustained.

First. The first question is of especial importance to the semi-arid states of California, Oregon and Washington, where climatic conditions in some sections so differ from those in others that the doctrine of the common law may be of advantage in one instance, and entirely unsuited to conditions in another. Probably, it was this diversity of conditions which gave rise to more or less confusion in the decisions—not only of Oregon, but of California—in respect of the subject. We have already spoken of the former; and one has only to compare the decision of the Supreme Court of California in *Lux* v. *Haggin*, 69 Cal. 255, with *Modoc L. & L. S. Co.* v. *Booth*, 102 Cal. 151, to realize that the rule with respect to the extent of the application of the common law of riparian rights is, likewise, far from being clear in the latter.

The question with which we are here primarily concerned is whether—in the light of pertinent history, of the conditions which existed in the arid and semi-arid land states, of the practice and attitude of the federal government, and of the congressional legislation prior to 1885—the homestead patent in question carried with it as part of the granted estate the common-law rights which attach to riparian proprietorship. If the answer be in the negative, it will be unnecessary to consider the second question decided by the court below.

For many years prior to the passage of the Act of July 26, 1866, c. 262, § 9, 14 Stat. 251, 253, the right to the use of waters for

mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uniformly recognized as having the better right to the extent of his actual use. The common law with respect to riparian rights was not considered applicable, or, if so, only to a limited degree. Water was carried by means of ditches and flumes great distances for consumption by those engaged in mining and agriculture. *Jennison* v. *Kirk*, 98 U. S. 453, 457-458. The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well. *Basey* v. *Gallagher*, 20 Wall. 670, 683-684; *Atchison* v. *Peterson*, 20 Wall. 507, 512-513.

This general policy was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866, *supra*. *Atchison* v. *Peterson, supra*. Section 9 of that act provides:

"That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: . . ."

This provision was "rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one". *Broder* v. *Water Co.*, 101 U. S. 274, 276; *United States* v. *Rio Grande Irrig. Co.*, 174 U. S. 690, 704-705. And in order to make it clear that the grantees of the United States would take their lands charged with the existing servitude, the Act of July 9, 1870, c. 235 § 17, 16 Stat. 217 218, amending the Act of 1866, provided that—

". . . all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory."

The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain. *Jones* v. *Adams*, 19 Nev. 78, 86; *Jacob* v. *Lorenz*, 98 Cal. 332, 335-336.

If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters in so far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result. That act allows the entry and reclamation of desert lands within the states of California, Oregon, and Nevada (to which Colorado was later added), and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota,[1] with a proviso to the effect that the right to the use of waters by the claimant shall depend upon *bona fide* prior appropriation, not to exceed the amount of waters actually appropriated and necessarily used for the purpose of irrigation and reclamation. Then follows the clause of the proviso with which we are here concerned:

"... all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." Ch. 107, 19 Stat. 377.

For the light which it will reflect upon the meaning and scope of that provision and its bearing upon the present question, it is well to pause at this point to consider the then-existing situation with respect to land and water rights in the states and territories named. These states and territories comprised the western third of the United States—a vast empire in extent, but still sparsely settled. From a line east of the Rocky Mountains almost to the Pacific Ocean, and from the Canadian border to the boundary of Mexico—an area greater than that of the original thirteen states—the lands capable of redemption, in the main, constituted a desert, impossible of agricultural use without artificial irrigation.

[1]Later to become the states of North and South Dakota.

In the beginning, the task of reclaiming this area was left to the unaided efforts of the people who found their way by painful effort to its inhospitable solitudes. These western pioneers, emulating the spirit of so many others who had gone before them in similar ventures, faced the difficult problem of wresting a living and creating homes from the raw elements about them, and threw down the gage of battle to the forces of nature. With imperfect tools, they built dams, excavated canals, constructed ditches, plowed and cultivated the soil, and transformed dry and desolate lands into green fields and leafy orchards. In the success of that effort, the general government itself was greatly concerned—not only because, as owner, it was charged through Congress with the duty of disposing of the lands, but because the settlement and development of the country in which the lands lay was highly desirable.

To these ends, prior to the summer of 1877, Congress had passed the mining laws, the homestead and preemption laws, and finally, the Desert Land Act. It had encouraged and assisted, by making large land grants to aid the building of the Pacific railroads and in many other ways, the redemption of this immense landed estate. That body thoroughly understood that an enforcement of the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings and effecting their distribution among innumerable settlers. In respect of the area embraced by the desert-land states, with the exception of a comparatively narrow strip along the Pacific seaboard, it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in the processes of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation. And this substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from

our vocabulary the legend "Great American Desert", which was spread in large letters across the face of the old maps of the far west.

In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed. By its terms, not only all surplus water over and above such as might be appropriated and used by the desert-land entrymen, but "the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable" were to remain "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes". If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed. While this court thus far has not found it necessary to determine that precise question, its words, so far as they go, tend strongly to support the conclusion which we have suggested.

In *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, the government sought to enjoin the irrigation company from constructing a dam across the Rio Grande River in the Territory of New Mexico, and from appropriating the waters of that stream. The object of the company was to impound the waters and distribute the same for a variety of purposes. The company defended on the ground that the site of the dam was within the arid region, and that it had fully complied with the water laws of the Territory of New Mexico in which the dam was located and the waters were to be used. The supreme court of the territory affirmed a decree dismissing the bill. This court reversed and remanded the case, with instructions to inquire whether the construction of the dam and appropriation of water would substantially diminish the navigability of the stream, and, if so, to enter a decree restraining the acts of the appellees to the extent of the threatened diminution. The opinion, dealing with the question of riparian rights, said that it was within the power of any state to change the common-law rule and permit the appropriation of the flowing waters for

any purposes it deemed wise. Whether a territory had the same power the court did not then decide. Two limitations of state power were suggested: first, in the absence of any specific authority from Congress, that a state could not by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow—so far, at least, as might be necessary for the beneficial use of the government property; and second, that its power was limited by that of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. With these exceptions, the court, however, thought (p. 706) that by the acts of 1866 and 1877 "Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow", and that "the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries." And see *Bean* v. *Morris*, 221 U. S. 485, 487; *Van Dyke* v. *Midnight Sun Mining & Ditch Co.*, 177 Fed. 85, 88-91.

In *Gutierres* v. *Albuquerque Land Co.*, 188 U. S. 545, it was held that the acts of 1866 and 1877 recognized, in respect of the public domain, the validity of the local customs, laws and decisions of the *territories* as well as of the states in respect of the appropriation of waters, and granted the right to appropriate such quantity as might be necessarily used to irrigate and reclaim desert land, and the right of the public to use the surplus for irrigation, mining, and manufacturing purposes subject to existing rights.

In *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, this court, while finding it unnecessary to decide whether lands in the arid regions patented after the Desert Land Act were accepted subject to the rule that priority of appropriation gives priority of right, said that the decision of the Supreme Court of Oregon to that effect in *Hough* v. *Porter*, *infra*, proceeded "on plausible grounds".

And in *Schodde* v. *Twin Falls Water Co.*, 224 U. S. 107, 122, an Idaho case which sharply presented conflicting claims under the common-law rule and the rule of appropriation, this court held that such common-law rights as were incompatible with the rule of prior appropriation for beneficial use could not coexist with the latter system.

Only four of the desert-land states have spoken upon the matter, and their decisions are not in harmony. The Supreme Court of Oregon in *Hough* v. *Porter*, 51 Ore. 318, held that the legal effect of the language already quoted from the Desert Land Act was to dedicate to the public all interest, riparian or otherwise, in the waters of the public domain, and to abrogate the common-law rule in respect of riparian rights as to all lands settled upon or entered after March 3, 1877. The supplemental opinion which deals with the subject beginning at p. 382 is well reasoned, and we think reaches the right conclusion. Subsequent decisions in Oregon are to the same effect. *Hedges* v. *Riddle*, 63 Ore. 257, 259-260; *Hill* v. *American Land & Livestock Co.*, 82 Ore. 202, 207; *Allen* v. *Magill*, 96 Ore. 610, 618-619.

This view was followed by the Supreme Court of South Dakota in *Cook, et al.* v. *Evans, et al.*, 45 S. D. 31, 38, and *Haaser* v. *Englebrecht*, 45 S. D. 143, 146.

The Supreme Court of Washington in *Still* v. *Palouse Irr. & Power Co.*, 64 Wash. 606, 612, gave a more limited construction to the Desert Land Act, holding that thereby Congress recognized and assented to the appropriation of water in contravention to the common-law right of the riparian owner only in respect of desert lands granted under the act. See, also, *Bernot* v. *Morrison*, 81 Wash. 538, 559-560.

In *Canal & Irrigation Co.* v. *Worswick*, 187 Cal. 674, 690, the Supreme Court of California followed the Washington court in holding that the language of the Desert Land Act applied only to desert-land entries.

To accept the view of the Washington and California courts would, in large measure, be to subvert the policy which Congress had in mind—namely, to further the disposition and settlement of the public domain. It is safe to say that by far the greater part of the public lands in the desert-land states and territories susceptible of reclamation in 1877 was remote from the natural sources of water supply. But these lands were subject to entry, not only under the Desert Land Act, but under other acts as well. Congress must have known that innumerable instances would arise where lands thereafter patented under the Desert Land Act and other lands patented under the preemption and homestead laws, would be in the same locality and would require water from the same

natural sources of supply. In that view, it is inconceivable that Congress intended to abrogate the common-law right of the riparian patentee for the benefit of the desert land owner and keep it alive against the homestead or preemption claimant.

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell* v. *Johnson*, 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation*. It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location. If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.

The proceedings in connection with the adoption of the Desert Land Act bear out this view. The bill which subsequently became the act was called up for consideration in the Senate on February 27, 1877. The report of the committee, among other things, said that the larger portions of the lands bordering on the streams had been appropriated; that the provisions of the bill would enable settlers by combined efforts to construct more extensive works and reclaim lands now worthless; that a system had already grown up in the states and territories included in the bill which recognized priority of appropriation as the rule governing the right to

the use of water, limiting the amount to that actually used, and thus avoiding waste. Senator Sargent of California, who was in charge of the bill, in the course of the debate said that one great difficulty had been that "cattle-men go under a fictitious compliance with the terms of the pre-emption law and take their land along the margin of the streams, and then there is no possibility of getting water to the back country at all. I want to provide so that persons in the back country may go above such a person, for instance, on Humboldt River, and take the water out and conduct it on to the back lands." Cong. Record, vol. V, pt. 3, 44th Cong., 2d Sess., pp.1965-1966. There is nothing in the language of the act, or in the circumstances leading up to or accompanying its adoption, that indicates an intention on the part of Congress to confine the appropriation of water in contravention of the common-law doctrine to desert-land entrymen.

Second. Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state", *Kansas* v. *Colorado*, 206 U. S. 46, 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. See *Wyoming* v. *Colorado*, 259 U. S. 419, 465.[2]

[2]In this connection it is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards. Two examples may be cited:

The Reclamation Act of 1902, c. 1093, 32 Stat. 388, directed the Secretary of the Interior (§ 8) to proceed in conformity to the state laws in carrying

The public interest in such state control in the arid-land states is definite and substantial. In *Clark* v. *Nash*, 198 U. S. 361, 370, this court accepted that view to the extent of holding that in the arid-land states the use of water for irrigation, although by a private individual, is a public use; and sustained as constitutional a state statute which, for purposes of irrigation, permitted an individual to condemn a right-of-way for enlarging a ditch across the land of another. Mr. Justice Peckham, delivering the opinion of the court, said:

"The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the States so situated."

For the foregoing reasons, we affirm the decree of the court below, passing without consideration the second question discussed by that court and upon which its decision rested, as to which we express no opinion.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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out the provisions of the act, and provided that nothing in the act should be construed as affecting or intending to affect or in any way interfere with the laws of any state or territory "relating to the control, appropriation, use, or distribution of water used in irrigation".

The Act of June 21, 1906, c. 3504, 34 Stat. 325, 375, made an appropriation for constructing irrigation systems to irrigate lands of the Uncompahgre, Uintah, and White River Utes in Utah, with the proviso that "such irrigation systems shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah", etc. This was amended by the Indian Appropriation Act of March 3, 1909, c. 263, 35 Stat. 781, 812, which again recognized the supremacy of the laws of Utah in respect of appropriation, and provided that the appropriation should "be used only in the event of failure to procure from the State of Utah or its officers an extension of time in which to make final proof for waters appropriated for the benefit of the Indians."